(1)
Supreme Court, U.S.
FILED
991965 JUN 6 - 2000
OFFICE OF THE CLERK

No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

R. C. KLANT
Lieutenant Commander
Judge Advocate General's Corps
U.S. Navy
Counsel for Petitioner

M. J. WENTWORTH
Lieutenant Commander
Judge Advocate General's Corps
U.S. Navy
Counsel of Record

U.S. Navy-Marine Corps
Appellate Review Activity
716 Sicard Street SE, Suite 1000
Washington Navy Yard, DC 20374
202-433-3600

36PP

QUESTION PRESENTED

Did the USCAAF err in holding that a court-martial composed of enlisted members had jurisdiction to try Petitioner where there was no personal request for trial by enlisted members as required under Article 25, UCMJ?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 2

Reasons for Granting the Petition 4

Conclusion 8

Appendix A 1a

Appendix B 7a

Appendix C 19a

Appendix D 22a

TABLE OF AUTHORITIES

Cases:

United States Supreme Court:

Collins v. McDonald, 258 U.S. 416 (1922) 5
Loving v. United States, 517 U.S. 748 (1996) 5
McClaughry v. Deming, 186 U.S. 49 (1902) 4,5
Runkle v. United States, 122 U.S. 543 (1887) 5
United States v. Solorio, 483 U.S. 435 (1987) 9
Toth v. Quarles, 350 U.S. 11 (1955) 5
Weiss v. United States, 510 U.S. 163 (1994) 6

Military Courts

United States v. Brandt, 20 M.J. 74 (C.M.A. 1985) 3,7
Gallagher v. United States, 22 U.S.C.M.A. 583, 46 C.M.R. 357 (1973) 7
United States v. Landrum, 3 M.J. 160 (C.M.A. 1977) 7
United States v. Nehring, No. 9700342 (Army Ct. Crim. App. 26 Mar 99) 8
United States v. Townes, 52 M.J. 275 (2000) 1,4,5,9
United States v. Townes, 50 M.J. 762 (N.M. Ct. Crim. App. 1999) 1,3,4,8
United States v. White, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972) 7

Constitution:

U.S. Const. amend. V 2

Statutes and Rules:

10 U.S.C. § 825 ..... passim

Other Authority

Hearings before House Armed Services Committee on H.R. 2489, 81st Congress, 1st Session, page 1147 6

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

KEVIN TOWNES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Staff Sergeant Kevin Townes, U.S. Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces [USCAAF], reported at 52 M.J. 275 (2000), is located at Appendix A (1a-6a). The opinion of the Navy-Marine Corps Court of Criminal Appeals [NMCCA], reported at 50 M.J. 762 (N.M. Ct. Crim. App. 1999), is located at Appendix B (7a-18a).

JURISDICTION

The USCAAF entered its judgment on March 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

Article 25(c)(1), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 825(c)(1) (1994), provides in pertinent part:

> Any enlisted member of an armed force on active duty . . . is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . but he shall serve as a member of a court only if . . . the accused personally has requested orally on the record or in writing that enlisted members serve on it.

STATEMENT

At an initial pre-trial session on February 10, 1993, the military judge advised Petitioner generally of his options to trial by a court-martial composed of officers and enlisted members, or military judge alone. Petitioner stated only that he understood these options and his counsel requested to delay forum selection. The military judge agreed. Record at 6.

At a pre-trial session on March 24, 1993, the judge

and one of Petitioner's defense counsel discussed a written request for trial by enlisted members signed by defense counsel. Petitioner did not sign this request and he did not indicate that he had discussed the request with counsel or otherwise concurred with it. Petitioner was present but was not questioned at all during this session. Record at 69.

On April 8, 1993, one of Petitioner's defense counsel informed the military judge that "at this time we make a formal election for officer and enlisted members." Record at 72. The military judge accepted this election without personally questioning the Petitioner regarding his desire to have enlisted members on the court. Petitioner also never signed any written request for trial by enlisted members.

On May 11, 1993, the military judge and counsel conducted *voir dire* in the Petitioner's presence. The original panel consisted of five enlisted members and six officers. Two enlisted and one officer member were excused after challenges. The eight remaining members heard a 10-day contested case on the merits and in sentencing. Petitioner was present during each of the sessions.

When the issue regarding the personal election of enlisted members was submitted on appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the NMCCA ordered an evidentiary hearing to determine what Petitioner's intentions were regarding forum selection at the time of trial. The hearing was held on May 3, 1997.

Petitioner testified that he did not recall making any choice as to forum or selecting the option for himself. When asked directly if he, at the time of trial, desired enlisted members, he answered that he did not recall. There is nothing in the record of trial indicating that Petitioner had ever discussed the ramifications of electing trial by enlisted members with counsel.

The NMCCA reversed because Petitioner never personally requested enlisted members, either orally or in writing. *Townes*, 50 M.J. at 766. The NMCCA held, in

accordance with precedent, that Congress clearly intended the election of enlisted members to be made personally by the accused and that failure to comply with the congressional mandate constituted jurisdictional error. *Townes,* 50 M.J. at 765 (citing *United States v. Brandt,* 20 M.J. 74 (C.M.A. 1985)).

The USCAAF set aside the NMCCA's decision on March 8, 2000. *United States v. Townes,* 52 M.J. 275 (1999). The USCAAF held that there was error in the selection of trial by enlisted members but that the error was not jurisdictional. *Townes*, 52 M.J. at 276.

REASONS FOR GRANTING THE PETITION

The USCAAF erred in holding that a court-martial composed of enlisted members had jurisdiction to try Petitioner where there was no personal request for trial by enlisted members as required under Article 25, UCMJ.

This Court has held, in reference to the appointment of statutorily disqualified members of a court-martial: "[W]hen in appointing such members [the convening authority] violates the statute, as in this case, by appointing men to the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction . . . ." *McClaughry v. Deming*, 186 U.S. 49, 65 (1902).

As this Court explained: "It is difficult for us to understand how an ephemeral court, composed of men detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant."[1] *McClaughry*, 186 U.S. at 65.

---

[1] "But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the

A court-martial "is a mere creature of the statute. . . and must be created under its provisions. It is a special body convened for a specific purpose and when that purpose is accomplished its duties are concluded and the court is dissolved." *McClaughry,* 186 U.S. at 64. In short, a court-martial is "wholly unlike the case of a permanent court created by constitution or by statute . . ." *McClaughry*, 186 U.S. at 64. For jurisdiction to attach, a court-martial "must be convened and constituted in accordance with the law." *McClaughrey*, 186 U.S. at 62.[2]

This Court's views of the fundamental nature of courts-martial have remained unchanged. A court-martial remains "a special statutory tribunal, with limited powers . . . unless facts essential to sustain its jurisdiction appear, it must be held not to exist." *Collins v. McDonald*, 258 U.S. 416, 418 (1922). This Court has found "nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts . . ." *Toth v. Quarles*, 350 U.S. 11, 17 (1955).

Moreover, in light of Congress' express constitutional authority to regulate the Armed Forces and the unique nature of the military's mission, this Court has "afforded an unparalleled degree of deference to congressional action

---

question of invalidity. We are not of that opinion. It is not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court ... than if it had been composed of a like number of civilians..." *McClaughrey*, 186 U.S. at 66.

[2] *Cf. Runkle v. United States*, 122 U.S. 543, 555-56 (1887)("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction....To give effect to its sentences, it must appear **affirmatively and unequivocally** that the court was legally constituted....There are no presumptions in its favor so far as these matters are concerned ....The facts necessary to show their jurisdiction...must be stated positively; and **it is not enough that they be inferred argumentatively**.") (emphasis added).

governing the military". *Loving v. United States*, 517 U.S. 748, 778 (1996)(Thomas, J., concurring). Accordingly, given Congress' plenary authority over regulations, procedures, and remedies related to military discipline, a court's deference must be "at its apogee" when reviewing the delicate balance struck by Congress between the rights of service members against the needs of the military. *Weiss v. United States*, 510 U.S. 163, 176-178 (1994).

Congress has given military accused an absolute right against having enlisted members serve on courts-martial, "unless the accused has **personally** requested orally or the record or in writing that enlisted members" serve on the court.[3] Art. 25(c)(1), UCMJ (emphasis added). The provision reflects clear congressional intent that an accused "personally makes that choice and doesn't delegate it to anyone else -- counsel or otherwise." Hearings before House Armed Services Committee on H.R. 2489, 81st Congress, 1st Session, page 1147.

The nondelegability of the choice reflects Congress' express determination "that **the right is so important** ...." that the accused himself exercise it and not allow his attorney to do so, despite the attorney's being authorized "to do many things as the agent of his client." *Id.* (emphasis added).[4] In the absence of an accused's personal request,

---

[3] An accused's personal request for enlisted members may be denied if such members cannot be obtained "on account of physical conditions or military exigencies." Art. 25(c)(1), UCMJ.

[4] Contrary to the USCAAF's opinion, Congress did **not** view the personal election of enlisted members as a mere procedural technicality to be observed as part of a military judge's administrative "housekeeping". The provision at issue in Petitioner's case has its legislative genesis in a recommended amendment to the Articles of War to provide for the personal election of trial by enlisted members, with the failure to elicit a personal election constituting a jurisdictional error. Congress

enlisted members are disqualified from serving on courts-martial and the court must be composed solely of officers.[5]

The plain language and clear intent of Article 25(c)(1), UCMJ, has long been upheld by military courts. *See e.g. United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357, 359-362 (1972); *Gallagher v. United States*, 22 U.S.C.M.A. 191, 46 C.M.R. 357 (1973); *United States v. Landrum*, 3 M.J. 160 (C.M.A. 1977). In each instance Congress was on notice of the military courts' strict application of the statute and took no action to relax its requirements.

The USCAAF last addressed the issue directly in *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985). *Brandt* recounted "clear congressional intent" that Article 25 was enacted to ensure the personal election of trial by enlisted members. *Brant* noted that "it might be tempting" to overrule prior cases holding that the absence of a personal election was jurisdictional error. *Brant*, 20 M.J. at 77. The court noted, however, that the choice "is for Congress" and not for the court. *Id.*.

Shortly thereafter, Congress did amend Article 25, adding a means through which an accused's personal election

---

deemed personal election of enlisted members by the accused vital to ensuring an accused's substantive rights. Congress made this determination based on evidence that the enlisted ranks themselves did not favor enlisted members serving on courts-martial due to the perceived unfairness of enlisted members and their vulnerability to unlawful command influence. An enlisted accused might nonetheless feel pressured into selecting trial by enlisted members because "it would be a reflection one way or the other on him – on his being guilty or innocent." The legislative origins of trial by enlisted members under Article 25, UCMJ, as described above, are set out in greater detail at *United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357, 359-62 (1972).

[5] Alternately, an accused has a conditional right to request trial by military judge alone. Art. 16(1)(B), UCMJ.

could be expressed, namely, "orally on the record". Pub. L. No. 99-661, § 803(a), 100 Stat. 3906 (1986). Significantly, Congress retained the requirement that the election be "personally" made. Thus, the meaning and intent of the statute is clearer than ever.

Based on this Court's decision in *McClaughry*, the conclusion that a violation of the provision must result in the affected findings and sentence is no less clear. The lack of a personal election by the accused gives rise to a statutory disqualification against enlisted persons serving as members of the court-martial. The participation of these statutorily disqualified members is so fundamental a flaw that the proceedings are rendered a nullity. The USCAAF's adoption of a "close enough for government work" construction of Article 25 and its impact on court-martial jurisdiction is contrary to the will of Congress and inconsistent with the historical and constitutional foundations of courts-marital.

Furthermore, in Petitioner's case the error's impact is not merely theoretical. After challenges, the panel consisted of eight members: five officers and three enlisted members. *Townes*, 52 M.J. at 276. Because findings of guilty would have required a vote of at least six members[6], then the findings necessarily were the product of at least one enlisted person whose participation was statutorily prohibited.

The error of the USCAAF's decision is also dramatically reflected in its practical impact. USCAAF's decision abandons Article 25's "bright line" approach to the lack of a personal request for enlisted members for a "case-by-case" analysis of the prejudice accruing from such error. As a result, when a personal election of trial by enlisted members is absent from the record, the military Courts of Criminal Appeals have compelled the accused and counsel to divulge the substance of attorney-client communications regarding forum selection in an attempt to fill the void. *See e.g. United States v. Nehring*, No. 9700342 (Army Ct. Crim

---

[6] *See* Art. 52(a)(2), UCMJ (requiring vote of two-thirds of the members present to convict).

App. 26 Mar 99)(unpublished interim order subjecting accused and counsel to questions regarding forum selection),(Appendix C) *writ appeal denied*, 2000 CAAF LEXIS 330 (C.A.A.F. Mar. 28, 2000)(denying appeal as "moot" in light of *Townes*, 52 M.J. 275 (2000))(Appendix D).

CONCLUSION

A military accused's decision whether to request trial by enlisted members is one of the most important decisions he makes at trial. Because of the significant differences in experience, education, and relationship to military authority between enlisted members and officers, enlisted members bring a unique perspective that can be either beneficial or prejudicial to an accused. In recognition of the impact the participation of enlisted members have on the substantive rights of a military accused, Congress enacted Article 25, UCMJ, to ensure that enlisted members were disqualified from courts-martial unless the accused personally requested their presence.

The USCAAF was clearly incorrect when it disregarded Congress' mandate under Article 25, UCMJ, and this Court's decision in *McClaughry* to find that the participation of enlisted members in Petitioner's court-martial, without his personal request, was not jurisdictional error. The USCAAF's decision in Petitioner's case threatens the substantive rights afforded service members by Congress under the UCMJ and alters the fundamental nature of court-martial jurisdiction as defined by this Court. Upon the 50th anniversary of the UCMJ, it is fitting that the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

R. C. KLANT
Lieutenant Commander
Judge Advocate General's Corps
U.S. Navy
Counsel for Petitioner

M. J. WENTWORTH
Lieutenant Commander
Judge Advocate General's Corps
U.S. Navy
Counsel of Record

U.S. Navy-Marine Corps
Appellate Review Activity
716 Sicard Street SE, Suite 1000
Washington Navy Yard, DC 20374
202-433-3600

June 2000

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-5004

Crim.App. No. 95 00849

Kevin TOWNES, Staff Sergeant
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Argued Dec. 9, 1999
Decided Mar. 8, 2000

For Appellee: *Lieutenant Commander R. C. Klant*, JAGC, USN (argued).

For Appellant: *Lieutenant Margaret E. Jolly*, USN (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

Opinion of the Court

CRAWFORD, Judge:

Pursuant to his pleas, appellee was convicted of unauthorized absence, rape, forcible sodomy, and various charges relating to the molestation of a child, in violation of Articles 86, 120, 125, and 134, Uniform Code of Military

Justice, *10 USC* § § *886*, 920, 925, and 934, respectively. Contrary to his pleas, a panel of officer and enlisted members convicted appellee of non-capital premeditated murder and assault and battery, in violation of Articles 118 and 128, UCMJ, *10 USC* § § *918* and 928, respectively. The convening authority approved the sentence of a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals set aside the contested charges and specifications and authorized a rehearing. *50 M.J. 762, 766 (1999).*

The Judge Advocate General certified the following issue to this Court:

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT STAFF SERGEANT TOWNES' FAILURE TO PERSONALLY SELECT ENLISTED MEMBERS WAS JURISDICTIONAL ERROR RATHER THAN PROCEDURAL ERROR THAT SHOULD BE TESTED FOR SUBSTANTIAL COMPLIANCE.

We hold that the judge erred in not obtaining on the record appellee's personal request for a trial by enlisted members. However, under the circumstances of this case, there was substantial compliance with Article 25, UCMJ, *10 USC* § *825*, and the error by the judge did not materially prejudice the substantial rights of appellee. Art. 59(a), UCMJ, *10 USC* § *859*(a). Thus, we answer the certified question in the affirmative.

FACTS

At a session under Article 39(a), UCMJ, *10 USC* § *839*(a), on February 10, 1993, appellee was advised of his rights concerning trial by a court-martial composed of officer and enlisted members and a trial by judge alone, and

appellee stated that he understood his options. On March 24, 1993, the judge and the trial defense counsel discussed a written request for a trial by enlisted members. This request was not signed by appellee. A few days later in appellee's presence, trial defense counsel informed the judge that "at this time we make a formal election for officer and enlisted members." On May 11, 1993, with members present, a lengthy voir dire occurred in the presence of appellee. The original panel consisted of 5 enlisted members and 6 officers. After excusal of two enlisted and one officer member, the eight members heard a 10-day contested case. Appellee was present and participated by testifying before the members an entire day. Appellee was also present during the instructions to the members and during the sentencing proceedings.

During the post-trial hearing on this issue which was ordered by the court below 4 years after the court-martial, neither appellee nor his counsel objected to the composition of the court-martial. When specifically asked whether he had elected officer and enlisted members, appellee stated he did not know and did not remember.

The Court of Criminal Appeals reversed because there was neither a personal oral request nor a written request by appellee. *50 M.J. at 764.* The court noted that the approach taken in *United States v. Turner, 47 M.J. 348 (1997),* and *United States v. Mayfield, 45 M.J. 176 (1996),* was "appealing." The Court, however, believed it was bound by prior precedent, i.e., *United States v. Brandt, 20 M.J. 74, 77 (CMA 1985)*(Congress intended the election of enlisted members be made by the accused in writing and signed personally by the accused). As a basis for its decision, the Court cited *United States v. Kelly, 45 M.J. 259 (1996). 50 M.J. at 765.*

DISCUSSION

There are two questions presented: first, was there error; and second, was it jurisdictional? We answer the first question in the affirmative and the second question in the negative.

Article 25(c)(1) now authorizes enlisted panel members if "before the court is assembled for the trial of the accused, the accused personally *has requested orally on the record or in writing* that enlisted members serve on it." (Emphasis added.)

Shortly after the holding in Brandt, Congress struck the prior language "has requested in writing" in favor of the underlined language. Pub. L. No. 99-661, § 803(a), 100 Stat. 3906 (1986). In passing this provision, the House Report noted that it "is similar to the provision in the Military Justice Act of 1983 authorizing oral requests to be tried by a military judge sitting without a jury." H.R. Rep. 718, 99th Cong., 2d Sess. 225 (1986). This House Report refers to the parallel between Article 16(1)(B) and Article 25(c)(1). Both Article 16 and Article 25 require personal election by the accused as to the forum.

In remarking on the provision for enlisted members, the committee noted that an accused "personally makes that choice and does the signing personally and doesn't delegate it to anyone else -- counsel or otherwise." Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1147 (1949). This Court has strictly enforced this provision. *United States v. Brandt, supra; United States v. Landrum, 3 M.J. 160 (1977); United States v. White, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972).*

We believe that failure to comply with Article 25 in this case, however, was not jurisdictional because there is

sufficient indication by appellee orally and on the record that he personally requested enlisted members. Appellee had been advised of his rights concerning the forum. After delaying this election for a few days, defense counsel in appellee's presence noted appellee's desire to be tried by an officer and enlisted panel. Two months later an officer and enlisted panel was impaneled subject to lengthy voir dire. After the members were sworn, the trial continued for 10 days, consisting of 35 sessions. Appellee testified for an entire day before the court members.

There is no allegation of coercion or that appellee was incompetent to make a knowing and intelligent decision. As we said in Turner, supra at 350, "the record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused." This does not, however, relieve judges of their obligation to obtain a personal election by the accused on the record.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for submission to that court for further review.

CONCUR BY:
SULLIVAN

CONCUR:

SULLIVAN, Judge (concurring in the result):
Common sense in trial practice must prevail again. *United States v. Turner, 47 M.J. 348, 351 (1997)* (Sullivan, J., concurring in the result). In this case, appellee stood next to his counsel as his attorney asked for the jury to be composed of one-third enlisted members. This request on

the record followed other on the record discussions about this matter and an "on the record" affirmation by appellee of his knowledge of his right to an enlisted section of the jury. I would hold as I did in *United States v. Turner, supra* ("substantial compliance" with Article 16 -- the right to trial by judge alone) that there was substantial compliance with Article 25 in the present case. Appellee was present and knowledgeable when his attorney asked for enlisted members. Appellee got enlisted members for his trial. I find his technical attack on the jury's verdict must fail. Fairness and common sense, not technicalities, should rule the law. *United States v. Turner, supra;* see *United States v. Mayfield, 45 M.J. 176, 177-78 (1996); United States v. Yates, 28 M.J. 60 (CMA 1989); United States v. Jette, 25 M.J. 16 (CMA 1987).*

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

R.B. LEO. D.A. ANDERSON
CAROL J. COOPER

UNITED STATES

v.

Kevin TOWNES, 212 70 4288
Staff Sergeant (E-6), U.S. Marine Corps

NMCM 95 00849 Decided 28 April 1999

Sentence adjudged 26 May 1993. Military Judge: R.W.G. Grove. Review pursuant to Article 66(c), UCMJ, of General court-martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

LCDR HOWARD B. GOODMAN, JAGC, USN, Appellate Defense Counsel
LCDR ROBERT C. KLANT, JAGC, USN, Appellate Defense Counsel
LT MARGARET E. JOLLY, JAGC, USNR, Appellate Government Counsel
Capt CHRISTOPHER N. HAMILTON, USMC, Appellate Government Counsel
LCDR PAUL JONES, JAGC, USNR, Appellate Government Counsel

COOPER, Judge:

The appellant was convicted, by general court-martial composed of enlisted and officer members, of unauthorized absence, premeditated murder, rape of a child, forcible sodomy of a child, assault and battery, and two specifications of indecent acts with a child in violation of Articles 86, 118(1), 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 918(1), 920, 925, 928, and 934 (1994). Appellant pled guilty to the unauthorized absence offense and all charges relating to the molestation of the child. The members found him guilty of premeditated murder and assault consummated by battery. The sentence adjudged was confinement for life,[1] total forfeiture of pay and allowances, reduction to paygrade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant's ten assignments of error, the Government's responses, and the excellent oral arguments of counsel. We conclude that the first assignment of error, absence of jurisdiction, has merit. We find that the court-martial lacked jurisdiction to try the contested charges because the appellant did not personally elect trial with enlisted members. Because of our findings on this assignment of error, we have not addressed the other nine. Arts. 59(a) and 66(c), UCMJ.

---

[1] Confinement for life was the mandatory minimum sentence for the charge of premeditated murder.

FACTS SURROUNDING THE REQUEST FOR ENLISTED MEMBERS

At the initial Article 39(a), UCMJ, session on 10 February 1993, the appellant was advised by the military judge of his forum rights, including his right to be tried by a court-martial composed of at least one-third enlisted personnel. Record at 6. The appellant acknowledged that he understood these rights and requested to delay his forum selection. The military judge agreed. Record at 6. On 10 March 1993, the military judge and defense counsel discussed possible trial dates and the expected length of the trial. Included in their computations was a day for seating members. The appellant was present at this session. Record at 29. On 24 March 1993, the military judge and the defense counsel discussed that the appellant was contemplating enlisted members as his forum selection. The appellant was not questioned during this discussion. Record at 69. On 8 April 1993, the trial defense counsel informed the military judge that "at this time we make a formal election for officer and enlisted members." Record at 72. The military judge accepted this election without personally questioning the appellant regarding his desire to have enlisted personnel on the members panel. *Id.* There was no written request for trial by enlisted members that had been signed by the appellant.

This was a vigorously litigated case with multiple pretrial sessions and motions. Preliminary sessions were held on 10 February, 10 and 24 March, and 8 and 29-30 April 1993. The first 276 pages of the record of trial concern these motions. During the litigation of at least one of the motions, the issue of the potential for some prejudicial effect on the members and the inadequacy of a limiting instruction to the members was discussed. Record

at 43, 50-51. The appellant was present during each preliminary session. On 11 May 1993, the members were present and lengthy voir dire occurred. The original panel included five enlisted persons and four officers. Record at 277-394. There were two enlisted members whose qualifications were discussed and who were excused for cause. Record at 394-96. The defense exercised one preemptory challenge against an officer member, leaving a panel of three officers and three enlisted persons. Record at 397. The members heard the case on the merits and sentencing from 17-26 May 1993. The appellant was present during each of the sessions. Record at 450-1325.

When the issue regarding the personal election of enlisted members was submitted to this court, we ordered an evidentiary hearing held to determine what the appellant's intentions were regarding forum selection at the time of trial. *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). NMCCA Order of 14 March 1997. This hearing was held on 3 May 1997. The appellant testified that he did not recall making any choice as to forum, or selecting the option for himself. Although he recalled attending the trial, he did not recall the procedures of the incidents leading up to the *DuBay* hearing. When asked directly if he, at the time of trial, desired enlisted members, he answered that he did not recall.[2] Record at 25-28.

---

[2] The relevant portions of that hearing are as follows:

MJ: Again, was it, in fact, your desire as your defense counsel indicated on 8 April 1993 to be tried by enlisted members rather than have your case heard by military judge alone or only officer members?

ACC: Sir, I don't recall what my choice was. I don't recall making any choice as to either of the two or the three. I'm still having a problem understanding what you are saying as far as enlisted, officer. I understand the judge alone, but I don't recall having the choice to make either of those options, sir.

. . . .

ACC: See, sir, I never told anybody personally I wanted judge alone or I wanted a panel. I never actually made that option for myself. I understand exactly [what] you are saying. I'm reading this and I'm following it and I don't have a problem actually comprehending the substance of the words in here, but what I'm trying to get across to you, sir, is that I never made the choice personally on how I was to be tried.

. . . .

MJ: You don't recall what your desire was with regard to forum?

ACC: Negative, sir. I do not recall.

. . . .

MJ: Was your defense counsel wrong when he said we make a formal election for officer and enlisted members?

ACC: Sir, I don't recall that. I don't want to say he was wrong. I just don't recall the actual incident being forwarded to me.

. . . .

MJ: Then one last question. I can ask this question a number of different ways but since it is in the order, let me ask it directly from the order.
Did you desire to be tried by enlisted members?

Jurisdiction

The issue of jurisdiction is a matter of law that we review *de novo*. *United States v. Ayala*, 43 M.J. 296 (1995). *See also United States v. Koseck*, 41 M.J. 60 (C.M.A. 1994).

> Article 25(c)(1), UCMJ, states in pertinent part: Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of a armed force . . . , if, . . . before the court is assembled for the trial of the accused, the accused **personally** has **requested orally** on the record **or in writing** that enlisted members serve on it. (Emphasis added.)

The record is clear that the appellant did not personally request, either orally or in writing, that enlisted members serve on his court-martial, but that his trial defense counsel did so on his behalf. The question before us then is whether Article 25, UCMJ, mandates that the appellant must actually do this himself or whether the election can be made for him through counsel. We find that the appellant must do so himself and the act of making the request cannot be delegated.

ACC: I don't recall, sir.

Record at 25-27.

Discussion

The appellant argues that this court is bound by our superior Court's ruling in *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), and the cases which preceded it: *United States v. White*, 21 C.M.A. 583, 45 C.M.R. 357 (1972), *Gallagher v. United States*, 22 C.M.A. 191, 46 C.M.R. 191 (1973) and *United States v. Landrum*, 3 M.J. 160 (C.M.A. 1977)(summary disposition). The appellant also argues that (1) the requirement for an accused to **personally** make the request for enlisted members either orally or in writing is a jurisdictional requirement; and (2) failure to adhere to that requirement resulted in a court-martial tribunal that was not authorized by law to enter a judgement as to the contested charges and the sentence. Appellant's Brief of 18 Apr 1996 at 20. During oral argument, the appellant also asserted that having ineligible members deciding his case materially prejudiced his substantial rights, citing Article 59(a), UCMJ.

The Government asks us to distinguish *Brandt* and apply the rationale of *United States v. Turner*, 47 M.J. 348 (1997) and *United States v. Mayfield*, 45 M.J. 176 (1996). This approach is appealing. If this were a case of first impression, we would view the election of enlisted members as an election of an affirmative right and the method of making the election, i.e., having the accused personally elect either orally or in writing, as only the procedure used to make this election. The appellant was present when the enlisted members were questioned during voir dire and was present when two of those members were excused for cause. He knew that the panel of members who were deciding his fate consisted of both officer and enlisted persons. The trial on the merits and sentencing was held over a 10-day period, and the appellant never once

voiced a complaint as to the composition of the court-martial. As in *Turner*, there has been no allegation that he was coerced or was incompetent to make a knowing and intelligent waiver of his right to all officer members. *Turner*, 47 M.J. at 350. Although he now states that he does not remember ever making an election as to forum and does not know what his desires were at the time, he has never said that the election was made contrary to his desires. Record of *DuBay* hearing of 3 May 1997. The appellant has not raised the issue of ineffective assistance of counsel, and we presume that his counsel was competent. *Strickland v. Washington*. 466 U.S. 668, 689 (1984). We also assume that, as an officer of the court, the trial defense counsel did not knowingly misrepresent the intentions of the appellant before the court-martial. If we were to take this approach, we would find that there was substantial compliance with Article 25, UCMJ, and no material prejudice to the appellant's substantial rights.

However, this is not a case of first impression. The facts of appellant's case fit squarely within the four corners of the decision in *Brandt*. We do not believe it can be factually distinguished, and thus we are not at liberty to overturn that precedent. *United States v. Kelly*, 45 M.J. 259 (1996); *United States v. Allbery*, 44 M.J. 226 (1996). In *Brandt*, our superior court, citing *White* and the legislative history of Article 25, UCMJ, made it clear that Congress intended the election of enlisted members be made by the accused. This election had to be made in writing and signed personally by the accused. His counsel could not act for him. *Brandt*, 20 M.J. at 76. Our superior Court, then the Court of Military Appeals, noted in *Brandt* that, although it might be tempting to overrule *White* and allow this personal election to be waived, they could not do so. *Brandt*, 20 M.J. at 77. It noted that Congress was on

notice as to the Court's application of Article 25(c)(1), UCMJ, when it made statutory changes and amended Article 16, UCMJ, in 1983.[3] The Court of Military Appeals stated that it must "stand fast until Congress decides to amend . . . Article [25, UCMJ] *Brandt*, 20 M.J. at 77.

In 1986, Congress did amend Article 25, but the amendment substituted the words "has requested orally on the record or in writing" for "has requested in writing." Pub. L. No. 99-661, § 803 (a), 100 Stat. 3906 (1986). The amendment did not delete the word "personally." Thus the appellant's case is the first Article 25, UCMJ, case before us since the 1986 amendments. In our review of the legislative history of Article 25, UCMJ, it seems clear that Congress originally made a distinction between the affirmative right to elect trial by military judge alone and the right to request trial with enlisted members. Congress later amended Article 25, UCMJ, but changed only the wording regarding how the election is made, *i.e.*, it could be made orally as well as in writing, and did not delete the requirement for an accused to **personally** make this election. S. Rep. No. 99-331, at 249 (1986), reprinted in 1986 U.S.C.C.A.N. 6444. A significant distinction appears between the wording of Articles 16 and 25, UCMJ -- which indicates that Congress affirmatively intended to keep the safeguard for an accused. This is the rationale of *Brandt*, and until our superior Court tells us otherwise, we find that the failure of the military judge to obtain

---

[3] The 1983 amendments allowed the request for a trial by military judge to be made either orally or in writing. When this change was made, Congress made no change to Article 25, UCMJ. Pub. L. No. 98-209, § 3(a), 97 Stat. 1394 (1983).

personally from the appellant, either orally or in writing, his election of enlisted members was jurisdictional error. Corrective action is required. Cf. *U.S. v. Lanier*, ACM 9700598 (A.CT.Crim. App. 2 Apr 1999) slip op. at 9.

We note that the appellant did plead guilty to some of the charges and specifications.[4] The providence inquiry was properly conducted of those charges and findings of guilty to those offenses were properly announced by the military judge. The findings as to those charges and specifications are not affected by the improper composition of the members panel and need not be disturbed. *United States v. Dixon*, 18 M.J. 310 (C.M.A. 1984).

Conclusion

Accordingly we affirm the findings as reviewed below as to Charge I and its specification, Charge IV and its specification, Additional Charge I and its sole remaining specification, Additional Charge II and its specification, and Additional Charge III and its specification. We set aside the findings as to Charges II and III and their specifications.[5] We also set aside the sentence. A

---

[4] None of the appellant's assignments of error addressed the findings as to the charges and specifications to which he pled guilty.

5 The charges against appellant were as follows:

Charge I - Article 86-Unauthorized absence
Charge II - Article 118-Premeditated Murder
Charge III - Article 128-Assault consummated by a battery

rehearing on the charges set aside and the sentence is authorized.

Senior Judge LEO concurs.

ANDERSON, Judge (dissenting):

In light of our superior court's reasoning in *United States v. Turner*, 47 M.J. 348 (1997), I find no reversible jurisdictional error in the manner of forum selection in this case.

At the appellant's original Article 39(a), UCMJ, session, the military judge explained his rights to a trial with members, to include a trial with members of one-third enlisted composition, or to a trial by judge alone. After this advice, the appellant confirmed that he understood his rights and that he had discussed the choices with his defense counsel. His counsel then asked to defer the selection of court composition to a later time. At another pretrial session a month later, the defense counsel informed the military judge that the defense had notified the Government in writing of its desire to have a trial with enlisted members. Several weeks later, at another pretrial session, the defense counsel, acting on behalf of and in the presence of the appellant, formally announced the election of trial by officer and enlisted members. The appellant did not object

---

Charge IV - Article 134-Indecent acts with a child

Additional Charge I - Article 120-Rape (of the child)
Additional Charge II - Article 125-Forcible sodomy of a child
Additional Charge III - Article 134-Indecent acts with a child

at the time or in any manner at any time throughout the lengthy trial. In addition, the appellant did not object at the time of the convening authority's action, and even after a *Dubay* hearing on the subject, he has never contradicted his counsel's representation to this date. No allegation has been made that he was coerced or was incompetent to make a knowing and intelligent decision.

Although I find a technical violation of Article 25, UCMJ, I find it to be a nonjurisdictional procedural error, and I find substantial compliance with that Article. Furthermore, I conclude that the error did not materially prejudice the substantial rights of the appellant. Art. 59(a). Common sense dictates no other result.

Accordingly, I respectfully dissent.

APPENDIX C

U.S. COURT ARMY COURT OF CRIMINAL APPEALS
Before
TOOMEY, TRANT, and CARTER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private El ANTHONY L.NEHRING
United States Army, Appellant

ARMY 9700342

ORDER

WHEREAS, the appellant filed a Brief on Behalf of Appellant on 7 April 1998;

WHEREAS, appellee filed a Brief on Behalf of Appellee on 4 February 1999;

WHEREAS, oral argument was heard before this Court on 24 March 1999;

WHEREAS, appellant has alleged in appellate brief and during oral argument that the record of trial does not indicate that he stated on the record his intent to be tried by a court-martial panel consisting of at least one-third enlisted members;

WHEREAS, the record of trial indicates that only appellant's trial defense counsel stated on the record that appellant requested a panel including enlisted members;

WHEREAS, appellant asserts that because he did not personally request, on the record, a panel that included enlisted members, in accordance with Article 25, UCMJ, and cases decided thereunder, his court-martial lacked jurisdiction to try him; and

WHEREAS, this Court is unable to resolve these issues, in this case, without an evidentiary hearing; it is by this Court, this date

ORDERED:

1. That the record of trial is returned to The Judge Advocate General for transmittal to an appropriate convening authority who shall order an evidentiary hearing before a military judge pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

2. That the hearing be conducted within sixty (60) days from the date of this order;

3. That, at the hearing, the military judge will receive all available evidence in order to make specific findings of fact concerning the allegations noted above.

4. That the military judge permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact and

conclusions of law with respect to the following questions:

a. Whether appellant's counsel advised appellant of his forum selection choices prior to or during the court-martial;
b. Whether appellant made a personal decision regarding forum choice, and the nature of that decision;
c. Whether appellant conveyed such decision to his military defense counsel and/or the military judge; and
d. Whether appellant's counsel correctly advised the military judge of appellant's personal decision concerning forum selection.

5. That at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned to this Court for further review.

DATE: 26 March 1999

FOR THE COURT:

JOSEPH A. NEURAUTER
Clerk of Court

APPENDIX D

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-8028/AR

United States, *Appellee*

v.

Anthony L. Nehring, *Appellant*

March 28, 2000, Decided

OPINION: On further consideration of the writ appeal filed in the above-entitled case, we note that the issue specified in our order of November 3, 1999, has been decided by *United States v. Townes*, 52 MJ 275 (2000). Review of the original issue regarding the attorney-client privilege raised in the writ-appeal petition was not granted in our November 3 order. The writ appeal is now moot. Accordingly, it is ordered that the decision of the United States Army Court of Criminal Appeals denying the petition for extraordinary relief is affirmed. The abatement of direct review under Article 66, Uniform Code of Military Justice, 10 USC § 866 (1994), is no longer in effect. Following such review, Article 67, UCMJ, 10 USC § 867 (1994), will apply.

(2)

99-1965

No.

In The

Supreme Court of the United States

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Supreme Court, U.S.
FILED
JUL 6 2000
CLERK

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE*
U.S. ARMY DEFENSE APPELLATE DIVISION
IN SUPPORT OF PETITIONER

JONATHAN F. POTTER
Major,
Judge Advocate General's Corps (JA)
United States Army
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703)588-5291

KEVIN J. MIKOLASHEK
Captain, JA
United States Army

ADELE H. ODEGARD
Colonel, JA
United States Army

38pp

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	15a

TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

Hunt v. Blackburn, 128 U.S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888) 7

Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) 8

Upjohn v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)..... 7,10

Military Courts:

United States v. Andeozzi, Army Docket No. 9800870..... 2

United States v. Daniels, No. 9500822 (Army Ct. Crim. App.) 2,6,9

United States v. Jeffery, No. 9700955 (Army Ct. Crim. App.) 2,3,6

United States v. McGee, No. 9700480 (Army Ct. Crim. App) 5,6

United States v. McKnight, Army Docket No. 9800871..... 2

United States v. Morgan, No. 9601890 (Army Ct. Crim. App.) 2,3,9

United States v. Nehring, No. 9700342 (Army Ct. Crim. App.) 3,8,9

United States v. Reed, No. 9801750 (Army Ct. Crim. App.)..... 1,9

United States v. Richards, No. 9700809 (Army Ct. Crim. App.)..... 2,9

United States v. Robinson, No. 9700852 (Army Ct. Crim. App.) 2,3,9

United States v. Urbina, No. 9801405 (Army Ct. Crim. App.) 2

STATUTES AND RULES:

10 U.S.C. § 825(c)(1), Uniform Code of Military Justice [UCMJ] Article 25 ..... *passim*

Manual for Courts-Martial [MCM], United States,Military Rule of Evidence 502 (1998)..... 8

Manual for Courts-Martial [MCM], United States, Military Rule of Evidence 501 (1998)..... 10

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE* U.S. ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The U.S. Army Defense Appellate Division files this brief in support of the U.S. Navy-Marine Corps Appellate Review Activity Defense Division's Petition for a Writ of Certiorari.[1]

The U.S. Army Defense Appellate Division represents individual soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division counsel represent these individuals at the Army Court of Criminal Appeals

---

[1] Counsel for U.S. Army Defense Appellate Division, Major Jonathan Potter, certifies that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

(ACCA); the Court of Appeals for the Armed Forces (USCAAF); and the Supreme Court of the United States.

Several soldiers represented by the Army Defense Appellate Division claim on appeal that their court-martial did not have jurisdiction because they never personally selected to be tried by a court-martial composed of enlisted members, as required by Article 25, Uniform Code of Military Justice (UCMJ). Rather than finding jurisdictional defect, appellate courts have ordered fact-finding inquiries to discover what advice the convicted soldier received from his trial defense counsel and what the convicted soldier communicated to his trial defense counsel regarding which forum he desired. Such fact-finding inquiries impermissibly pierce confidential attorney-client communications.

Amicus is concerned that the USCAAF's holding that "substantial compliance" with Article 25 (where a defense counsel elects the forum for an accused) will lead to never-ending occasions where the attorney-client veil must be pierced. Currently, *amicus* has eleven cases pending before the Army Court of Criminal Appeals in which an accused who was tried by a panel of enlisted members did not personally select such a panel in accordance with Article 25.[2] In five of these cases the trial defense counsel was ordered to testify despite

---

[2] *United States v. Daniels*, Army Court of Criminal Appeals (Army) Docket No. 9500822; *United States v. Morgan*, Army Docket No. 9601890; *United States v. Richards*, Army Docket No. 9700809; *United States v. Nehring*, Army Docket No. 9700342; *United States v. McGee*, Army Docket No. 9700480; *United States v. Robinson*, Army Docket No. 9700852; *United States v. Jeffery*, Army Docket No. 9700955; *United States v. Andeozzi*, Army Docket No. 9800870; *United States v. McKnight*, Army Docket No. 9800871; *United States v. Urbina*, Army Docket No. 9801405; *United States v. Reed*, Army Docket No. 9801750.

invoking the attorney-client privilege.[3] Evidentiary hearings have not yet been ordered in three of these cases; it is likely that trial defense attorneys will invoke the privilege in these cases as well.

SUMMARY OF ARGUMENT

Article 25, UCMJ's bright line requirement that a military judge elicit an accused's personal selection of a court-martial panel consisting of enlisted members ensures that an accused has indeed decided to be tried by such a forum. Influences unique to military service, specifically the deference to superiors and unflinching obedience to orders, require this protective measure. *Amicus* cites one client who perceived a court-martial convening order (which included a panel of enlisted members) as an order from a general officer which made clear the general's decision that the accused would be tried by a panel of enlisted members, a decision from a superior officer which precluded the accused from making that decision. The accused listened obediently as the military judge and defense counsel discussed the forum options. He never personally selected the forum, as Congress intended. This case perfectly demonstrates the importance of complying strictly with Article 25, UCMJ.

In addition, allowing trial defense counsel to elect forum for an accused is inconsistent with Congressional intent and inherently leads to questions regarding whether the accused intended to be tried by that forum. When an accused later claims that the forum that heard his case was not the forum he desired, courts inherently turn to conversations between accused and trial defense counsel to determine whether the accused actually

---

[3] *Nehring, Robinson, McGee, Jeffery* and *Morgan, supra.*

informed the trial defense counsel of his forum request. Such intrusions are not permitted. In enacting Article 25(c)(1), Uniform Code of Military Justice [UCMJ] 10 U.S.C. § 825(c)(1))(1994), Congress established a method that would prevent such intrusions: they required that an accused who is tried by enlisted members must have personally, either orally or in writing, selected that forum. Abiding by such a simple requirement easily prevents subsequent interference with confidential communications between attorney and client.

The privilege allows a client to prevent an attorney from disclosing confidential communications made between attorney and client. Although there are circumstances in which the privilege is either waived or does not apply, no such circumstances exist here. *Amicus* currently represents several clients whose trial defense attorneys were ordered to testify to the substance of confidential communications as a result of the failure to require an accused to personally select forum.

ARGUMENT

I. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS DENIED SERVICEMEMBERS THE RIGHT TO BE TRIED BY A FORUM OF THEIR OWN SELECTION.

In enacting Article 25, UCMJ, Congress manifested a clear and unambiguous intent that an accused must personally select trial by enlisted members before that accused is tried by such a forum. *Amicus* currently represents soldiers who, because of circumstances unique to the military, were denied the right not to be tried by an

enlisted panel through the trial judge's failure to obtain the accused's personal forum selection decision.

A classic example of the failure of "substantial compliance" to protect a military accused's right to select enlisted members lies in *United States v. McGee*, No. 9700480 (Army Ct. Crim. App., unpublished opinion ordering evidentiary hearing, 14 July 1999)(Appendix A). In *McGee*, the Army Court of Criminal Appeals found that the record contained no evidence of an "on the record" request by the accused. *(McGee* at 2). In a post-trial affidavit, Sergeant First Class (SFC) McGee stated that although his counsel advised him of the various forum selection options, neither his defense counsel nor the military judge explained to him how forum selection would be effectuated. (Post-trial affidavit of Sergeant First Class McGee, 24 May 1999)(Appendix B). However, when SFC McGee was advised of his forum rights the day of trial, he believed that the convening authority, an Army Major General, had already decided how he would be tried and had made that decision known in the court-martial convening order. *Id.* SFC McGee stated that he "never questioned General Ernst's authority to issue the order" and that he "could not ... comprehend how any actions on [his] part could invalidate a General's orders." *Id.*

SFC McGee was a member of the elite Ranger regiment, a unit whose soldiers pride themselves on discipline and unflinching obedience to orders from the officers appointed to lead them.[4] When shown an

---

[4] All those selected to be part of the Ranger regiment undergo extensive selection and training and abide by the "Ranger Creed," which provides, in pertinent part: "Gallantly will I show the world that I am a specially selected and well-trained soldier. My courtesy to superior officers ... shall set the example for others to follow." U.S. Army Student Handbook (SH) 21-76 (1992).

"order" from a general, SFC McGee believed that the General had decided that a panel consisting of enlisted members would hear the case. An attorney trained in military law knows that a court-martial convening order does not determine whether an accused will face trial by judge alone, or a panel consisting of officer or enlisted members. However, SFC McGee was trained not in military law, but in the fundamentals of tactics, discipline and obedience to orders. He understood the order as a decision regarding which officers and enlisted soldiers would hear his case. He did not question the order. He listened obediently as his defense counsel and the military judge discussed which forum would try him. *McGee, supra* at 5.

This scenario illustrates the dangers inherent in the USCAAF's failure to follow Congress' specific mandate that a military accused personally select enlisted members before being tried by such a forum. The reflexive obedience to orders and great deference to superiors that are absolutely essential to combat-readiness in the military may also prejudice a military accused unless measures are taken to prevent these qualities from encroaching on an accused's right to select forum. The bright line rule established by Congress in Article 25, UCMJ is such a preventive measure. However, USCAAF's failure to enforce the statute renders the statute ineffective to protect a military accused from the influences inherent in the military's hierarchical culture where obedience to orders and deference to superiors are indelibly ingrained into servicemembers.

Congress' intent was to require a military judge to elicit a military accused's personal election of an enlisted panel before that accused is tried by enlisted members.

This requirement protects the military accused from the dangers discussed above and ensures that the selection of forum is the personal selection of the accused.

II. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS LED TO IMPERMISSIBLE INTRUSIONS INTO ATTORNEY-CLIENT COMMUNICATIONS.

a. The attorney-client privilege.

The Supreme Court has recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). The rationale for its existence was articulated long ago by the Supreme Court:

> [The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888)(quoted in *Upjohn*, 449 U.S. at 389).

In the military, the attorney-client privilege exists pursuant to the Manual for Courts-Martial [M.C.M.], United States, Military Rules of Evidence (1998). Mil. R. Evid. 502 provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing

> confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, ...between the client ... and the lawyer ... (Mil. R. Evid. 502).

Advice concerning the forum choices that an accused has the right to make encompasses not only a recitation of the Manual for Courts-Martial, but necessarily includes which forum is most advantageous to a particular accused.

b. Failure to enforce Article 25 has led to unnecessary breaches of the attorney-client privilege.

When the Army Court of Criminal Appeals is faced with an accused who was tried by a court-martial panel which consisted of enlisted members and the accused did not personally select this forum, appellate courts have ordered limited evidentiary hearings to determine the accused's intent. Since a court cannot compel an accused to speak, *see Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), courts turn to the accused's trial defense attorney. *Amicus* currently represents several clients whose trial defense attorneys have been ordered to testify in limited evidentiary hearings regarding the discussions they had with their respective clients concerning forum selection. *United States v. Nehring*, No. 9700342 (Army Ct. Crim. App., 26 March 1999)(unpublished order requiring evidentiary hearing)(Appendix C), is such a case. In *Nehring*, the Army Court of Criminal Appeals ordered an evidentiary hearing to resolve, *inter alia*, whether the appellant's counsel advised appellant of his forum selection choices. During the hearing, the appellant (through counsel) objected to his trial defense attorney

testifying to any of the questions posed by the Army Court of Criminal Appeals. The appellant's counsel during the evidentiary hearing stated:

> [E]ach and every one of the questions that the appellate court wants you to try to answer, if [the appellant's trial defense counsel] were to testify specifically to those questions, it would violate the privilege because none of the communications between [counsel] and Private Nehring were ever intended to be disclosed at — to anyone ... [t]he right to make the election is right up until that moment in time that he makes the election. Everything else is purely ... advice and discussions leading to that, which are protected by the privilege.

(5 May 1999, Record of Evidentiary Hearing at 18, Nehring, Army Ct. Crim. App. No. 9700342.)

Limited evidentiary hearings conducted to ascertain the substance of communications between attorney and client are commonly ordered by the Army Court of Criminal Appeals. Including *Nehring*, *amicus* currently represents eight clients whose claims of jurisdictional error based upon the absence of a personal election of enlisted members resulted in such a hearing. *See United States v. Daniels*, No. 9500822 (Army Ct. Crim. App.); *United States v. Morgan*, No. 9601890 (Army Ct. Crim. App.); *United States v. McGee*, No. 9700480; *United States v. Richards*, No. 9700809 (Army Ct. Crim. App.); *United States v. Robinson*, No. 9700852 (Army Ct. Crim. App.); *United States v. Jeffery*, No. 9700955 (Army Ct. Crim. App.); *United States v. Reed*, No. 9801750 (Army Ct. Crim. App.). As long as the USCAAF refuses to enforce the plain-language requirement of Article 25 that an enlisted

panel be personally selected, ambiguity and inevitably more intrusions into attorney-client communications will result.

c. *Limited and clearly-defined circumstances in which the privilege does not apply do not exist here.*

The attorney-client privilege clearly applies to the communications that are the subject of these hearings. Further, the attorney-client privilege has not been waived with respect to any of these communications. In order for a communication to be protected by the privilege, it must be confidential. Mil. R. Evid. 502(a). A communication is deemed confidential

> if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Mil. R. Evid. 501(b)(4).

Communications made to an accused's attorney regarding forum selection are confidential. The attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *United States v. Upjohn*, 499 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this regard, the privilege not only protects an attorney's advice regarding forum selection, but whatever information, concerns and desires a client has regarding this important choice.

Further, there is no evidence that the clients in these cases intended for their attorney to disclose their forum selection choices to any third party. Indeed, Article 25, UCMJ provides that the decision is to be

made by the accused personally, and not through his attorney. We presume the understanding between attorney and client is that, although the client may communicate to his attorney his intention to select a panel of enlisted members, it is the *client*, not the attorney, who will ultimately communicate that to the court. Second, even if an accused informs his attorney that he intends to select a particular forum, that accused may change his mind up until the time that he is called upon by the judge to select forum. All communications leading up to that point are made in furtherance of the attorney rendering legal services, are not intended to be communicated to a third party, and are protected by the privilege.

Violations of the attorney-client privilege are easily prevented by enforcing the clear and unambiguous provisions of Article 25, UCMJ, which requires an accused to personally make forum selection. The Court should grant the Petition for Certiorari and should strike down the USCAAF's failure to enforce the statute.

CONCLUSION

The Court should see the importance of Article 25, UCMJ as preserving an accused's forum selection rights against influences inherent in military service. In addition, as long as appellate courts decline to enforce the strict, bright-line requirement of Article 25, UCMJ, that an accused personally select a panel of enlisted members, appellate courts will continue a barrage on the privileged communications between attorney and client. The Court should consider the impermissible intrusions into privileged communications a secondary,

but important, effect of the USCAAF's disregard of Congress' mandate in Article 25, UCMJ. The Court should therefore grant the Petition for Certiorari.

Respectfully submitted,

JONATHAN F. POTTER
Major,
Judge Advocate General's
Corps (JA)
United States Army
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5291

KEVIN J. MIKOLASHEK
Captain, JA
United States Army

ADELE H.ODEGARD
Colonel, JA
United States Army

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

SQUIRES, ECKER AND MERCK

Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class LOWELL L. McGEE

United States Army, Appellant

ARMY 9700489

United States Army Infantry Center and Fort Benning

L.R. Dean, Military Judge

For Appellant: Colonel John T. Phelps II, JA; Colonel Adele H. Odegard, JA; Major Leslie A. Nepper, JA; Captain Paul J. Perrone, Jr., JA (on briefs); Captain Patricia A. Lewis, JA. For Appellee: Colonel Russell S. Estey, JA; Lieutenant Colonel Eugene R. Milhizer, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on brief); Colonel Russell S. Estey, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on supplemental brief).

14 July 1999

MEMORANDUM OPINION

ECKER, Judge:

Contrary to his pleas, a General Court-Martial composed of officer and enlisted members convicted appellant of attempted premeditated murder, attempted conspiracy to commit murder, attempted conspiracy to solicit the commission of murder, and two solicitations to commit premeditated murder,[1] in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934 [hereinafter UCMJ]. His approved sentence included a dishonorable discharge, forfeiture of all pay and allowances, confinement for twenty years and reduction to private E1. Appellant was credited with 201 days toward the sentence to confinement.

In his supplemental assignment of error,[2] appellant claims his court-martial lacked jurisdiction to try him, rendering the findings void. The essence of this claim[3] concerns the record's failure to show, as required by Article 25(c)(1), UCMJ, that appellant personally, on the record, chose trial by a panel composed of at least one-third enlisted members. We agree that the record of trial contains no evidence of an "on the record request"

---

[1] Appellant was originally charged with two conspiracies: to commit murder and solicitation to commit murder. Due to a failure of proof, the military judge reduced those offenses to attempted conspiracies. The specifications were then placed, along with the specification of attempted premeditated murder, under the original attempt charge, the original conspiracy charge, (Charge II) was dismissed, and Charge III was renumbered. The members acquitted appellant of a third solicitation specification.

[2] Appellant's original assignment of error asserted a claim of multiplicious charging. See Rules for Court-Martial 907(b)(3)(B)(and discussion thereto); see also R.C.M. 307(c)(4) discussion.

[3] The claim is phrased in the following terms:

THE ABSENCE IN THE RECORD *OF ANY* REQUEST FOR TRIAL BY OFFICER AND ENLISTED MEMBERS CONSTITUTES JURISDICTIONAL ERROR AND RENDERS THE COURT-MARTIAL PROCEEDINGS IN THIS CASE VOID.

by appellant. We have also considered appellant's unchallenged sworn post-trial affidavit on this matter. This review satisfies us that none of the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (1997), directly apply such that we could fairly resolve the issue of forum selection on the whole record now before us without a post-trial hearing. "[T]he record of trial, the pleadings, and the affidavit do not demonstrate conclusively that appellant [is or]is not entitled to relief." *See United States v. Hanley*, No. 97-0363/AF (C.A.A.F. February 24, 1999)(citing *Ginn*, 47 M.J. 236). Therefore, as our superior court did in Hanley, "we believe that further inquiry concerning this allegation must be undertaken before we can continue our review of this case." *See id.*

Appellant was a highly regarded combat veteran serving in the Ranger Regiment. While some witnesses characterized him as slow, his military records listed his general technical (GT) score as 118, or well above average. Further, in slightly more than ten years of active duty service, appellant had attained the rank of Sergeant First Class.

At appellant's arraignment, the military judge fully and correctly advised him of his three forum options. This advice indicated that he had the right to be tried by a panel of at least five officer members; but, if he requested if, the panel would include at least one-third enlisted members. He was also told that he could request trial before the military judge sitting alone. Appellant stated, in response to the judge's questioning, that he understood his rights concerning forum selection, the three options available to him, and that the election of forum was his choice. However, the actual election, and its announcement on the record,

was deferred on request of appellant's defense counsel.[4]

At the last 39(a) session,[5] held on 17 March, before the trial on the merits started,[6] the following colloquy occurred:

> MJ: I just want to clarify two matters on the record before we formally start at this point. Did the accused formally elect an enlisted panel on the record, Captain Rose? I don't recall that he did.
>
> DC: We indicated that on the record, your honor.

---

4 MJ: Do you understand the differences between trial before members and trial before judge alone?

ACC: Yes, your honor.

MJ: And do you understand *the choices that you have?*

ACC: Yes, your honor.

MJ: By which type of court *do you wish* to be tried?

DC: Your honor, at this time we'll defer election of forum.

MJ: Okay. I'll allow you to do that.

The accused will now be arraigned.
(R. at 6-7)(emphasis supplied.)

5 UCMJ art. 39(a).

6 Subsequent to arraignment, four additional pretrial sessions under Article 38(a), UCMJ, were convened to address motions and preliminary matters. During the third session, held on 5 March, defense counsel sought to resolve a request for witnesses and identify who would be detailed to the court-martial panel so that he could prepare for the voir dire of the panel. After some discussion, the military judge urged trial counsel to expedite the selection of the members and give that information to the defense. The apparent result of this urging was the issuance of Court-Martial Convening Order Number 2, dated II March 1997, which detailed enlisted members to the court-martial panel for the first time in appellant's case. At the next (fourth) Article 39(a) session, held on 13 March, defense counsel discussed with the military judge how his planned voir dire of potential members might bear on the length of the proceedings. Appellant was present at both of these sessions but had no questions or input concerning the matters noted above or his forum rights.

MJ: Okay. I know that that was his desire, but I don't know that we actually covered that on the record.

DC: We did not, your honor.

MJ: Okay —

DC: I believe that we deferred selection of forum in the previous 39(a).

MJ: Okay, and his desire, I take it from looking at the fact that there are enlisted folks sitting — names at least over here on the panel, is that he be tried before an enlisted panel. Is that correct?

DC: Yes, your honor, it is.

MJ: Okay, and the final matter was plea. At one point I allowed the accused to defer. Would the accused formally enter a plea to the charges and specifications?

DC: To all charges and specifications the accused pleads: Not Guilty.

MJ: Okay. Is there anything additional before we call the members in? I believe those are the only matters that we still had that absolutely, positively had to be taken care of before we started the trial.

TC: No, sir, there's nothing additional.

MJ: Okay. This 39(a) Session is terminated. If you would call the members. . .

No other discussion concerning appellant's forum election appears in the record of trial. However, during voir dire, the record indicates that the defense questioned three members individually and that appellant consulted with counsel during the questioning of an officer and an enlisted member. Finally, during the

announcement of challenges, counsel again consulted appellant before challenging an officer member for cause and an enlisted member peremptorily. Both challenges were granted.

In his sworn post-trial affidavit, appellant now recalls being advised concerning the three forum types by both the military judge and detailed defense counsel, but asserts he was never "informed [] how forum selection would be effectuated." He goes on to state that he never discussed a choice of forum with anyone, and after Court-Martial Convening Order Number 2 was provided to the defense, "It was my belief that when General Ernst issued the order, *dictating members that would try me*, the issue was closed," and "I could not, *nor can I*, comprehend how any action on my part could invalidate a General's orders." Appellant's Exhibit XXXIII-O (emphasis supplied). He concludes by stating, "I never requested to be tried by enlisted members" but instead followed the General's order.

Article 25(c)(1), UCMJ, states that enlisted personnel may serve as members of a court-martial panel hearing the case of an enlisted soldier "only if . . . the accused personally has requested orally on the record or in writing that enlisted members serve on it." Further, the article requires that this election be made during a *pretrial* Article 39(a), UCMJ, session or, in the absence of such a proceeding, *before assembly* of the court. Violation of the article's requirements was held to be jurisdictional, requiring the setting aside of any convictions by an enlisted panel not personally selected on the record by an accused. *See United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972); *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985). *But cf. United States v. Mayfield*, 45 M.J. 176 (1996).

Until recently, this court has applied *White* and required strict compliance with the terms of Article 25, UCMJ. *See United States v. Brookings*, 33 M.J. 793 (A.C.M.R. 1991); *United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). However, the recent decision of the Court of Appeals for the Armed Forces in *United States v. Turner*, 47 M.J. 348 (1997), casts substantial doubt on the continued vitality of White and its progeny. *Turner*, involved related, and what was previously considered jurisdictional significant, requirements for selecting trial by judge alone under Article 16, UCMJ. The court applied the concept of substantial compliance and sustained an otherwise defective forum selection. Based on *Turner*, this court recently applied the concept of substantial compliance to resolve a technical violation of Article 25, UCMJ. *See United States v. Lanier* — M.J. — (Army Ct. Crim. App. 2 Apr. 1999). *But cf. United States v. Townes*, — M.J. — (N.M. Ct. Crim. App. 28 Apr. 1999).

We note that in finding substantial compliance in the *Turner* case, the court stated, "The record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused. Art. 59(a)." 47 M.J. at 350. In reaching this conclusion concerning the record "as a whole," the court looked to the prevailing federal treatment of Fed. R. Crim. P. 23 (a), (b) which is "the civilian counterpart of Article 16." This review indicated that, "[w]here the record reflects that the defendant understands his rights" and either "desires" or "consent[s]" to the forum involved, failure to strictly comply with the requirements of the Federal Rules "is regarded as a nonjurisdictional procedural error." *Turner*, 47 M.J. at 350 *(citing United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990)).

While appellant's affidavit addresses pertinent questions bearing on the presence of enlisted members, its silence in other areas is almost deafening. Further, portions appear to conflict with statements by appellant found in the transcript as well as representations of his trial defense counsel. This latter point may also implicate a question of ineffective assistance of counsel. In any event, the record of trial and appellant's affidavit, taken together, place in doubt whether he understood his forum rights and more importantly, whether the forum utilized was due to his choice or one he consented to.

Accordingly, the current record needs further development before we can fully and fairly evaluate the credibility of appellant's affidavit or resolve the issues noted above, and thereby determine whether Article 25, UCMJ, was "substantially complied" with, and if not, whether any prejudice has occurred due to the error. This court has used the *Dubay*[7] proceeding to attempt resolution of such questions. *See, e.g., United States v. Daniels*, ARMY 9700601 (Army Ct. Crim. App. 23 Sept. 1998) (unpub.); *cf. Hanley*, No. 97-0963/AF. Under the circumstances of this case, we elect to use that mechanism for additional fact-finding.

The record of trial shall be returned to The Judge Advocate General for remand to a convening authority. That convening authority will refer the record to a general court-martial for a hearing pursuant to Dubay, 37 C.M.R. at 413. The military judge will determine whether appellant made and communicated a forum selection, and if so, how he communicated such selection. The military judge will hear the respective contentions

---

[7] *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

of the parties on the questions, permit the presentation of witnesses and evidence in support thereof, make rulings as appropriate and within fourteen days of the hearing, enter findings of fact and conclusions of law thereon. At the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, shall be returned to this court for further review.

Senior Judge Squires and Judge Merck concur.

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court

APPENDIX B

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	AFFIDAVIT
	)	
APPELLEE,	)	CRIM. APP. DKT.
	)	NO. 9700480
V.	)	
	)	
LOWELL L. MCGEE SFC,	)	
UNITED STATES ARMY	)	
	)	
APPELLANT.	)	
	)	

I, Lowell L. McGee, do swear that the following statements are true and correct to the best of my knowledge:

1. During one of the initial meetings between Captain Rose, my detailed defense counsel, and I, Captain Rose informed me that there were three types of General Court-martial forums: Judge alone; officer panel, and; officer and enlisted panel.

2. During the above stated conversation, Captain Rose told me that we did not have to worry about that (forum) at the time because there would be delays and there were other important things to take care of.

3. During the initial session with the military judge, he informed me of the three types of forum.

4. The next discussion we had regarding forum was when Captain Rose showed me the order by General Ernst that had my name on it and listed the members

that would try me.

5. During the discussion mentioned in para. 4 above, Captain Rose asked me if I knew any of the members on the list or thought that they may know me. I told him that I knew Captain Townsend. He told me something to the effect that that did not matter because General Ernst had excused him.

6. I vaguely recall the conversation between the military judge and Captain Rose on the day of the trial. I did not believe it was important at the time because General Ernst had already issued the order as to who would try me.

7. I was informed of the various types of forum for a General Court-martial by Captain Rose and the military judge.

8. Neither Captain Rose nor the military judge informed me how forum selection would be effectuated.

9. It was by (sic) belief that when General Ernst issued the order, dictating members that would try me, the issue was closed.

10. I never questioned General Ernst's authority to issue the order.

11. I could not, nor can I, comprehend how any actions on my part could invalidate a General's orders.

12. I never requested to be tried by enlisted members.

13. General Ernst issued an order that some of the panel members would be enlisted and that order was followed.

/signed/
Lowell L. McGee
PO Box 76799-4W

310 McPherson Ave.
Ft. Leavenworth, KS 66027-1363

STATE OF KANSAS
COUNTY OF LEAVENWORTH

Sworn to and subscribed before me this 24th of May 1999.

(SEAL)

/signed/
NOTARY
MY COMMISSION EXPIRES
29 MAY 2000

APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

TOOMEY, TRANT, and CARTER

Appellate Military Judges

UNITED STATES, Appellee

v.

Private El ANTHONY L. NEHRING

United States Army, Appellant

ARMY 9700342

ORDER

WHEREAS, the appellant filed a Brief on Behalf of Appellant on 7 April 1998;

WHEREAS, appellee filed a Brief on Behalf of Appellee on 4 February 1999;

WHEREAS, oral argument was heard before this Court on 24 March 1999;

WHEREAS, appellant has alleged in appellate brief and during oral argument that the record of trial does not indicate that he stated on the record his intent to be tried by a court-martial panel consisting of at least one-third enlisted members;

WHEREAS, the record of trial indicates that only appellant's trial defense counsel stated on the record

that appellant requested a panel including enlisted members;

WHEREAS, appellant asserts that because he did not personally request, on the record, a panel that included enlisted members, in accordance with Article 25, UCMJ, and cases decided thereunder, his court-martial lacked jurisdiction to try him; and

WHEREAS, this Court is unable to resolve these issues, in this case, without an evidentiary hearing; it is by this Court, this date

ORDERED

1. That the record of trial is returned to The Judge Advocate General for transmittal to an appropriate convening authority who shall order an evidentiary hearing before a military judge pursuant to *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).
2. That the hearing be conducted within sixty days from the date of this order;
3. That, at the hearing, the military judge will receive all available evidence in order to make specific findings of fact concerning the allegations noted above.
4. That the military judge permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact and conclusions of law with respect to the following questions:
    a. Whether appellant's counsel advised appellant of his forum selection choices prior to or during the court-martial;
    b. Whether appellant made a personal deci-

sion regarding forum choice, and the nature of that decision;

c. Whether appellant conveyed such decision to his military defense counsel and/or the military judge;

d. Whether appellant's counsel correctly advised the military judge of appellant's personal decision concerning forum selection.

5. That at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned to this Court for further review.

DATE: 26 March 1999

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court

Supreme Court, U.S.
FILED
(1)
991966 JUN 07 2000
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

RICHARD KAGAN,

Petitioner,

v.

THOMAS ROTH, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

65pp

QUESTIONS PRESENTED

1. Whether certiorari should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.)?

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth Amendment right to [the] assistance of counsel in his defense?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTION AND STATUTES INVOLVED .. 2

STATEMENT OF THE CASE 4

1. Pretrial, Trial and Direct Appeal 5

2. Litigation Pursuant to 28 U.S.C. § 2254 10

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 25

APPENDICES

USCA 7 COA DENIAL dated March 17, 2000 ..... App. 1

U.S. District Court Memorandum opinion and judgment dated June 23, 1999 ..... App. 2

U.S. District Court order denying COA dated August 12, 1999 ..... App. 15

Original trial court Motion to expand bond requirements for medical treatment dated June 1, 1994 ..... App. 18

Original trial court Motion for Continuance because of petitioner's medical difficulties dated July 14, 1994 ..... App. 20

Original trial court Motion for Continuance because of petitioner's medical difficulties dated July 21, 1994 ..... App. 24

Petitioner's Affidavit in support of § 2254 relief filed in 97 C 8424 (case below) ... App. 28

TABLE OF AUTHORITIES

Cases	PAGE(S)
Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999)	20
Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373 (1996)	14, 20, 22, 23
Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975)	14, 16, 18, 19, 20, 22
Dusky v. United States, 362 U.S. 402 (1960)	14, 15
Glasser v. United States, 315 U.S. 60 (1942)	17, 18
Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966)	14, 16, 17, 19, 20, 22
Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810 (1992)	14, 20, 21, 22, 23
Slack v. McDaniel, 529 U.S. ___, 120 S.Ct. 1595 (2000)	i, 12, 15
Spevack v. Klein, 385 U.S. 511 (1967)	17
Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841 (1964)	24
United States v. Boigegrain, 155 F.3d 1181 (10th Cir. 1998)	18

United States v. Lopez, 71 F.3d 954 (1st Cir. 1995) 23, 24

United States v. Weston, 206 F.3d 9 (DC Cir. 2000) 21

Watts v. Singleterry, 87 F.3d 1282 (11th Cir. 1996) 18

Williams v. Taylor, 529 U.S. ___, 120 S.Ct. 1495 (2000) ..... i, 12, 13, 14

Williams v. Taylor, 529 U.S. ___, 120 S.Ct. 1479 (2000) ..... i, 12, 14, 15

Constitution, Statutes and Rules

United States Constitution, Fifth Amendment 2

United States Constitution, Sixth Amendment 2

United States Constitution, Fourteenth Amendment 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2253 ..... 2, 3, 12

28 U.S.C. § 2254(d)(1) 3, 10, 11, 12, 23, 24

28 U.S.C. § 2254(e)(2) 3

725 ILCS 5/104-10, 13(b) (1994) 4, 16

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court.

Richard Kagan (hereafter petitioner) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 17, 2000.

OPINION BELOW

The memorandum order of the United States Court of Appeals for the Seventh Circuit, denying petitioner's request for a Certificate of Appealability (hereafter COA), was filed on March 17, 2000 (App. 1, *infra*). The district court's unpublished opinion and judgment denying relief pursuant to 28 U.S.C. § 2254 was filed on June 23, 1999 and is reproduced at App. 2-14, *infra*. The district court denied petitioner's request for a COA on August 12, 1999 (App. 15-17, *infra*).

JURISDICTION

The memorandum order denying petitioner's request for a COA was issued by a panel of the United States Court of Appeals for the Seventh Circuit on March 17, 2000 (App. 1, *infra*). No petition for rehearing was submitted. This petition for writ of certiorari follows within ninety days, and this Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTION AND STATUTES INVOLVED

The United States Constitution, Fifth Amendment, in pertinent part provides:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The United States Constitution, Sixth Amendment in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . and to have the assistance of counsel for his defense.

The United States Constitution, Fourteenth Amendment, in pertinent part provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253, in pertinent part, provides:

> **§ 2253.** Appeal
>
> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall he subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or . . .

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right . . .

28 U.S.C. § 2254(d)(1) states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(e)(2), in pertinent part, states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule on constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

In 1994 the Illinois Criminal Code, 725 ILCS 5/104-10 provided:

> A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him *or to assist in his defense*. 725 ILCS 5/104-10 (ital. emph. added)

Further, under 725 ILCS 5/104-13(b) if the fitness issue involves defendant's physical condition

> ". . . the court *shall appoint one or more physicians and in addition, such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition*" (ital. emph. added).

STATEMENT

The decision below raises serious questions regarding the right of an Illinois citizen to remain trial-free pending a reasonable opportunity to assist in preparing his defense. For several months prior to trial, petitioner's cardiac physicians had made arrangements for his cardiac surgery. Awaiting that surgery, petitioner was arrested and charged with, *inter alia*, attempt first-degree murder. Pending trial he was compelled to ingest a medley of life-support coronary medications. The trial court ruled that 40/60 percent artery blockages rose [only] to the level of elective surgery. On July 6, 1994, two weeks before petitioner's attempt first-degree murder trial, the trial court denied a trial adjournment, stating:

> It is my order that Mr. Kagan not have any elective surgery prior to the date of trial unless he first is granted permission by the court, so I am denying the motion.

Tr. of 7/6/94 at pp. 27-28.

On both July 14 and 21, 1994, the trial court denied permission for petitioner to undergo cardiac surgery. Trial commenced on July 21, 1994.

1. **Pretrial, Trial and Direct Appeal.**

Petitioner is a 54 year old former Illinois attorney, serving a thirty-year sentence in the Illinois Department of Corrections following his 1994 Lake County, Illinois jury conviction for soliciting the attempt murder of his former spouse.

During April 1994, petitioner was in an Evanston, Illinois hospital for coronary-related difficulties. He was scheduled to have cardiac surgery at the Arizona Heart Institute during May 1994. On April 28, 1994, petitioner was arrested and charged by information with soliciting the murder of his spouse (C. 1, 3; C refers to orig. rec.). On May 4, 1994, a Lake County, Illinois grand jury returned a three-count indictment charging petitioner with solicitation to commit murder for hire, conspiracy to commit first-degree murder and attempt first-degree murder (C. 5-8).

Petitioner's cardiovascular condition was brought to the trial court's attention as early as May 13, 1994 by virtue of a written motion to reduce the $1,000,000 bail. *Inter alia*, the May 13, 1994 motion recited:

> Mr. Kagan was stricken with a cerebral aneurysm in 1988, which required that a metal shunt and a clip be permanently implanted in his head and a filter implanted in his artery through the groin.
>
> Additionally, he has recently been diagnosed with angina pectoris, a cardiovascular condition,

> which requires immediate attention in the form of surgery. Mr. Kagan is on life support medication at this time. Because of his health, he is in a life-threatening situation, which is deteriorating, and which has deteriorated since his incarceration on his arrest in this case. Because of his medical condition, Mr. Kagan has been unable to assist in the preparation of his defense. When counsel met with Mr. Kagan at the jail on May 2, 1994, the meeting had to be discontinued because the stress of the discussions brought on a seizure. Copies of Mr. Kagan's medical records are attached as Exhibit A. At the time of his arrest, Mr. Kagan had been scheduled for heart surgery at the Arizona Heart Institute in Phoenix, Arizona. The defense is prepared to present the testimony of Mr. Kagan's treating physician should the court wish to hear live testimony regarding Mr. Kagan's condition and prognosis. (C. 14-15)

After petitioner was released pending trial, he sought to expand the conditions of bail to allow him to travel to Arizona for cardiovascular surgery (C. 91). In part, his June 1, 1994 filing asserted [that] ". . . Mr. Kagan has been and will be unable to assist in the preparation of his defense" [because of his deteriorating condition] (App. 18-19, *infra*).

On June 16, 1994, the trial court was advised by the petitioner that he was awaiting surgery scheduling to clear two artery blockages to his heart and he has not been able to assist in the preparation of his defense (Tr. of 6/16/94 at Tr. 58). The trial court denied medically related travel and trial continuance requests (*Id.* at Tr. 79).

On July 6, 1994, defense counsel brought to the attention of the trial court that petitioner was still attempting to schedule coronary surgery in the Chicago area ". . . because he really has not been able to fully participate in preparing for trial" (Tr. of 7/6/94 at Tr. 25). Defense counsel went on to direct the court's attention that the contemplated coronary surgery was open heart bypass surgery because less invasive coronary treatment was unavailable based on petitioner's deteriorating kidney condition (Tr. of 7/6/94 at Tr. 26-27). The trial court acknowledged awareness of petitioner's coronary condition, noting, in part, that petitioner has a forty-sixty percent blockage in two veins, but there is no testimony that the blockage requires immediate surgery (*Id.* at Tr. 27). The trial court, while denying a trial continuance, noted:

> It is my order that Mr. Kagan not have any elective surgery prior to the date of trial unless he first is granted permission by the court, so I am denying the motion.

Id. at Tr. 27-28.

On July 14, 1994, approximately a week in advance of trial, petitioner's counsel again sought an adjournment of the trial date (Orig. Rec. C. 116; App. 20-23, *infra*). The continuance motion noted that petitioner had been under the constant care of physicians for his coronary condition since before his April 28, 1994 arrest and because of petitioner's coronary condition, he has been unable to assist his attorney in the preparation of his defense because of chest pains and the need for nitroglycerin tablets. In defense counsel's verified submission, she asserted that petitioner's inability to assist in defense preparation was such that she could not pur-

sue an aggressive and effective defense when defendant is not competent to assist counsel in the preparation of that defense (App. 20-22, *infra*). During colloquy with the trial court, defense counsel explained:

> MS. RIVKIN-CAROTHERS [defense counsel]: and it's an exam that determines the legal mental competency of a person to stand trial. And what that includes is whether or not the defendant is capable of understanding the procedures, which I'm sure Mr. Kagan is, whether or not he knows the parties, what the role of the defense attorney is, the prosecutor, the judge, which I'm sure Mr. Kagan does.
>
> The other critical question and legal question is whether or not he's capable of and able to assist his defense attorney in preparing a defense of this case.

Transcript of July 14, 1994 at pg. 16.

During the same proceeding, one of petitioner's physicians testified that it was possible that the continued use of certain medications might allow petitioner's level of stress to be ameliorated to the point where he could assist in pretrial preparation within four-six weeks (Tr. of 7/14/94 at Tr. 14). The trial court seemed somewhat piqued at the suggestion that petitioner may not be competent to stand trial. Defense counsel went on to explain that a critical and legal question is "whether or not he's capable of and able to assist his defense attorney in preparing a defense of this case" (*Id.* at 16). Defense counsel further explained that the critical question was ". . . whether or not a defendant is capable of assisting counsel in preparation of his own defense and [defense counsel] has indicated those problems to the court" (*Id.* at 17-18). The prosecutor successfully urged

rejection of defense counsel's competency importunings (*Id.* at 18-19).

On July 21, 1994, the date trial was to commence, defense counsel again moved for an adjournment contending, *inter alia*, that a confluence of circumstances compelled a trial adjournment to August 29, 1994 (Org. Rec. C. 148-150; App. 24-27, *infra*). Included in the reasons for a continuance was the late disclosure of information from the prosecution, prejudicial pretrial publicity and, that petitioner's physical condition precluded him from taking part in the preparation of his defense. In part, defense counsel's verified filing explained:

> Counsel for defendant seeks a continuance, again, based on the physical condition of her client, which condition has precluded him from taking part in the preparation of his defense, because of the stress related to going through the 784 pages of discovery the State has provided to date in this case. Mr. Kagan is unable to review these materials with counsel in the manner required to prepare for trial without extreme chest pains, and the need to take medication. Mr. Kagan's treating physician has him on a medical regiment designed to increase his ability to handle stress, including the stress of trial and trial preparation.
>
> * * *
>
> The only purpose in seeking a continuance is to give Mr. Kagan the time to be able to prepare and assist in the preparation of his defense . . .

(Org. Rec. C. 149-150; App. 26, *infra*).

Defense counsel's competency examination and adjournment entreaties were rejected, and petitioner's trial commenced with jury selection on July 21, 1994.

The trial culminated in plenary guilty verdicts on July 26, 1994 (C. 212-214). Petitioner's bail was revoked and on September 7, 1994, a 42-year prison sentence was imposed (C. 319-321). Petitioner has been immured since July 26, 1994.

Petitioner prosecuted a direct appeal, asserting in substance that his coronary maladies, when blended with the ongoing need to inject life support medications, rendered him the functional equivalent of a walking zombie, thus depriving him of any realistic opportunity to assist in his defense.

The Illinois Appellate Court rejected petitioner's due process and Sixth Amendment arguments, but reduced petitioner's sentence to thirty-years, *People v. Kagan*, 283 Ill.App.3d 212, 669 N.E.2d 1239 (2nd Dist. 1996). Petitioner's request for discretionary Illinois Supreme Court review, raising Fifth and Sixth Amendment issues was denied on December 4, 1996 (169 Ill.2d 579, 675 N.E.2d 637).

2. **Litigation Pursuant to 28 U.S.C. § 2254.**

Petitioner filed his § 2254 on December 4, 1997 (R. 1 in § 2254 record). The State of Illinois responded on March 27, 1998 (R. 13). Absent objection, petitioner was granted leave to supplement his § 2254 along with a supporting memorandum and compendium of exhibits (filed on November 24, 1998, R. 16-18, 20-22). The parties filed additional pleadings during 1999 (R. 26-28).

On June 23, 1999, the district court filed a memorandum order, opinion and judgment dismissing petitioner's § 2254, absent an evidentiary hearing (R. 29-

31; App. 2-14, *infra*). The district court's memorandum opinion explained that petitioner had exhausted the primary question of whether *the trial was conducted* while petitioner suffered substantial infirmities, App. 7-13. The district court noted that the petitioner had rejected the State's offer for a "medical furlough" (App. 11-12), but failed to note that the medical furlough option was early on while petitioner was in custody, and assuming, arguendo, it was available while petitioner was on bail—it meant that the petitioner would be remanded to custody, shackled, and transported by prison officials to a hospital where petitioner may have had the benefit of much-needed coronary surgery. Additionally, the district court failed to recognize that the *only medical testimony* presented to the trial court occurred on July 14, 1994, during which one of petitioner's cardiac physicians testified that with the use of certain prescribed medications, petitioner could probably assist in pretrial preparation within four-six weeks [of July 14, 1994] (Pretrial Tr. – 7/14/94 at Tr. 14). Likewise the district court's opinion failed to include any reference to the persistent prosecutorial objections to any trial adjournment, notwithstanding petitioner's extraordinary cardiac difficulties. Finally, the district court's memorandum opinion eschewed noticing not only the unexplained rush-to-trial (84 days from arrest to trial), but the total absence of any informed reason for the persistent objections by the State prosecutor to any trial adjournment. The district court opinion included:

> In short, Kagan has not shown that the Illinois Appellate Court's adjudication of this claim involved either an unreasonable application of clearly established Federal law as determined by the Supreme Court or "resulted in a decision

> that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

App. 12, *infra*.

On August 12, 1999, the district court declined petitioner's COA request (R. 36, App. 15-17, *infra*).

On October 12, 1999, petitioner filed his application, with exhibits, for a COA with the Clerk of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 2253. Petitioner sought a COA on the following issue:

Whether the Court below and the state court decision was contrary to, or involved an, unreasonable application of clearly established federal law as determined by the Supreme Court of the United States? Petitioner contends that the state court and district court decisions, were clearly contrary to, or involved an unreasonable application of United States Supreme Court precedent.

On March 17, 2000, the Court of Appeals for the Seventh Circuit summarily rejected petitioner's COA application (App. 1, *infra*).

REASONS FOR GRANTING THE WRIT

1. Whether certiorari should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.)?

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth Amendment right to [the] assistance of counsel in his defense?

1. Review should be granted, the judgment below reversed and the case remanded because neither the federal habeas court, nor the Seventh Circuit had the benefit of the Court's decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.). For example, *Slack v. McDaniel* explains that:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that a reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong.

120 S.Ct. at 1604. In Justice O'Connor's opinion for the court in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000), she explained that when, and under what circumstances the federal habeas court can grant habeas claims which were adjudicated on the merits in State court:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court

> arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

1205 S.Ct. at 1523. Additionally, Justice Kennedy's opinion in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000), explained:

> A prisoner who developed his claim in state court and can prove the state court's decision was "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," is not barred from obtaining relief by § 2254(d)(1). See *Williams v. Taylor, ante*, at ___ (opinion of O'Connor, J.).

120 S.Ct. at 1489.

Each of the intervening decisions impact on petitioner's case. For example, federal habeas rejection in petitioner's case is in clear conflict with Justice O'Connor's opinion for the Court in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. at 1523, because the decision below is both "contrary to" and represents "[an] unreasonable application" of the Court's holdings in, *inter alia*, *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992); and *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373

(1996).[1] Further, petitioner can demonstrate that [a] reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong (*Slack v. McDaniel,* 120 S.Ct. at 1604). Here petitioner developed his claim in state court and can demonstrate that the state court's decision was "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," [and] is not barred from obtaining relief by § 2254(d)(1). See *Williams v. Taylor, ante*, at 120 S.Ct. at 1489 (Justice Kennedy's opinion in *Williams v. Taylor* (citing to Justice O'Connor's *Williams v. Taylor* opinion for the court).

Since neither the district court nor the United States Court of Appeals for the Seventh Circuit had the benefit of the three intervening opinions of the Court, review should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions.

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth

---

[1] In *Dusky v. United States*, 362 U.S. 402, 402 (1960) (Per Curiam), the Court granted certiorari and remanded the petitioner's competency questions to the district court, explaining that the "test must be *whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding*—and whether he has a rational as well as factual understanding of the proceedings against him," 362 U.S. at 402 (ital. emph. added).

Amendment right to [the] assistance of counsel in his defense?

Petitioner has worded his second certiorari question by paraphrasing the issue in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966), as it appears in *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975). In *Pate*, Justice Clark, affirming the Seventh Circuit's grant of habeas relief, explained that the State conceded that the conviction of an accused person while he is legally incompetent violates due process, * * * and that state procedures must be adequate to protect [this] right, 382 U.S. at 378. However, the failure to follow Illinois statutory enactments regarding *Robinson's* competency deprived *Robinson* of a fair trial, 383 U.S. at 385.

In petitioner's case, the Illinois statutory enactments were adequate, but ignored. The 1994 Illinois Criminal Code, (reproduced in pertinent part, *ante* at pg. 3-4) notes that if a defendant is unfit because of his . . . physical condition . . . or to assist in his defense—[then] the court shall appoint one or more physicians and in addition, such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition (summarizing 725 ILCS 5/104-10 and 13(b)). Here the State trial court disregarded the several written and verbal exhortations of defense counsel in support of a trial adjournment, as well as the testimony of a physician who testified that a six-eight week continuance, coupled with prescribed medication would allow the petitioner to (in all probability) fully participate with counsel in preparing his own defense (App. 20-22, *infra*; Tr. of 7/14/94 at pp. 7-14).

Starting with Justice Clark's opinion in *Pate v. Robinson*, 383 U.S. 375 (1996), we know that "the conviction of an accused while he is legally incompetent violates due process * * * and that State procedures must be adequate to protect this right," 383 U.S. at 378. The *Pate* opinion also explained that . . . "While Robinson's demeanor at trial might be relevant to the ultimate decision of his sanity, it cannot be relied upon to dispense with a hearing on that very issue," 383 U.S. at 386. This statement in *Pate* is *apropos* because on July 14, 1994, while declining to adjourn petitioner's criminal trial, the State trial court remarked:

> THE COURT: Well, you know, I really consider that last argument quite disingenuous, because Mr. Kagan has been in this court a number of times in connection with motions where he's proceeded, counsel being here, and stepped up and said, "my attorney is going to be late" and then otherwise directed the court as to what was happening. Mr. Kagan has struck me as being extremely alert, extremely in touch with reality and very competent in his addressing this court on those occasions that he has in an informal way. . . .

Tr. of 7/14/94 at pp. 16-17 (quotation marks in original transcript).[2] Defense counsel countered by explaining:

---

[2] During June-July 1994, petitioner addressed the trial court on two occasions, explaining either that his attorney would be late or was unavailable. Nonetheless, the trial court may have harbored the view that since petitioner was an attorney, his constitutional entitlements were reduced. Not so. See *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (lawyers also enjoy first-class citizenship); *Glasser v. United States*, 315 U.S. 60, 68-70

(continued...)

> MS. RIVKIN-CAROTHERS: Well, I'm not saying it is a mental deficiency. What I'm saying is that the legal standard is whether or not a defendant is capable of assisting counsel in preparation of his own defense. And I've indicated to the court the problems that I've had.

Id. at pp. 17-18.[3]

In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975), Chief Justice Burger delivered the Court's opinion vacating the denial of post-conviction relief where the primary question was whether *Drope* was deprived of due process by the failure of the trial court to order a psychiatric examination with respect to his competency to stand trial, 420 U.S. at 163-164. Pretrial, *Drope's* attorney filed a motion to adjourn the trial date

---

[2] (...continued)
(1942) (Glasser-an erstwhile AUSA [was] entitled to Sixth Amendment conflict-of-interest protections).

[3] In *Watts v. Singleterry*, 87 F.3d 1282, 1287 (11th Cir. 1996), a divided court vacated the denial of § 2254 relief, but explained [that] "because legal competency is primarily a function of defendant's role in assisting counsel in conducting the defense, *the defendant's attorney is in the best position to determine whether the defendant's competency is suspect*," (ital. emph. added); accord, *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) (Of all the actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate. * * *). In *Drope v. Missouri, ante and infra*, the Court noted that defense counsel's representation concerning the competency of his client is unquestionably a factor which should be considered, 420 U.S. at 177, n. 13 (citations omitted).

in order that *Drope* might be examined for competency at the time of the offense and competency to stand trial. The trial court rejected the motion noting, *inter alia*, that the motion was not in proper form, *id.* at 165. While reversing the denial of relief below, Justice Burger explained:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity . . . to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. * * * For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice.

420 U.S. at 171-172 (internal authorities omitted). Justice Burger then explained the holding in *Pate v. Robinson*:

> In *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. Although in *Robinson* we noted that Illinois "jealously guard[ed]" this right, *id.*, at 385, 86 S.Ct. at 842, we held that the failure of the state courts to invoke the statutory procedures deprived Robinson of the inquiry into the issue of his competence to stand trial to which, on the facts of the case, we concluded he was constitutionally entitled.

420 U.S. at 172. *Drope* also explained:

> Especially in cases arising under the Due Process Clause [is] it important to distinguish between issues of fact that are here foreclosed and

> issues which, though cast in the form of determinations of fact, are the very issues to review which this court sits.

420 U.S. at 175, n. 8 (parallel citations omitted).[4]

In *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992), the Court reversed a capital conviction, finding that the forced administration of antipsychotic medications violated *Riggins'* right to a fair trial. Justice Kennedy, concurring, explained:

> *Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.*

504 U.S. at 144 (ital. emph. added, supporting citations omitted).

The case at hand is strikingly similar to *Riggins*. In *Riggins*, his attorney sought a pretrial court order discontinuing the involuntary ingestion of antipsychotic drugs in advance of trial. The trial court denied the request, and *Riggins'* trial went forward while he con-

---

[4] Petitioner concedes that *Drope's* footnote 8 appears grammatically puzzling. However, given the putative § 2254 deference to State court determinations, petitioner contends that footnote 8 means (at least where there is a Due Process Clause-competency-challenge), the customary presumption of correctness is abated. Accord, *Barnett v. Hargett*, 174 F.3d 1128, 1135-36 (10th Cir. 1999) (affirming conditional grant of § 2254 relief where defendant's competency was at issue, noting that a State court's competency determination arrived at with an incorrect standard of proof is not entitled to a presumption of correctness and is analogous to no competency hearing at all—citing *Pate v. Robinson* and *Cooper v. Oklahoma*).

tinued the involuntary ingestion of antipsychotic medications. Justice O'Connor's opinion for the Court noted that the district court allowed the involuntary administration of the drugs without making:

> . . . *any* determination for the need of this course or *any* findings about reasonable alternatives.

504 U.S. at 136 (ital. emph. in original).

There is precious little difference between *Riggins* and the case at hand. Petitioner, being denied the opportunity for pretrial cardiac surgery, was compelled, for day-to-day survival, to ingest a medley of coronary prescription medications, prior to and during trial. As a result of ingesting the essential-survival medications the petitioner was "basically, a zombie," (App. 29, *infra*). Hence the harm to petitioner parallels precisely the constitutional harm endured by *Riggins*. Here petitioner, having been denied the opportunity for pretrial cardiac surgery, was compelled to ingest life-support and cardiac medications in advance of, and during trial. Thus, petitioner contends that for Due Process Clause purposes there can be no constitutional distinction between the forced medications in *Riggins* and the compelled ingestion of essential coronary and related medications (see Pet.'s § 2254 affidavit at App. 28-30, *infra*).[5] In *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct.

---

[5] In *Riggins*, Justice O'Connor rejected harmless error balancing ("We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently had he not been given Mellaril"; 504 U.S. at 137). In *United States v. Weston*, 206 F.3d 9 (DC Cir. 2000), the court held that a pretrial detainee could not be

(continued...)

1373 (1996), Justice Stevens, for the full Court, explained:

> No one questions the existence of the fundamental right that petitioner invokes. We have repeatedly and consistently recognized that "the criminal trial of an incompetent defendant violates due process." * * * *Drope v. Missouri*, 420 U.S. 161, 171-172, 95 S.Ct. 896, 903-904, 48 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). Nor is the significance of this right open to dispute. As Justice KENNEDY recently emphasized:
>
> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope v. Missouri*, 420 U.S. 161, 171-172, 95 S.Ct. 896, 903-904, 48 L.Ed.2d 103 (1975)." *Riggins v. Nevada*, 504 U.S. 127, 189-190, 112 S.Ct. 1810, 1817-1818, 118 L.Ed.2d 479 (1992) (opinion concurring in judgment. [n.4]).

* * * * *

---

[5] (...continued)
required to ingest antipsychotic medications, citing *Riggins*. In part, Circuit Judge Tatel's concurring opinion explained that forced medication impaired the fair trial guarantees of the Fifth and Sixth Amendment (*Weston's* fair trial rights include rights (1) not to be tried unless he is competent to "consult with counsel, and to assist in preparing his defense," (citing *Drope v. Missouri*, 420 U.S. at 171; 206 F.3d at 20).

> For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." *Riggins v. Nevada*, 504 U.S. at 189-190, 112 S.Ct., at 1817 (KENNEDY, J., concurring in judgment).

517 U.S. at 354, 364 (n. 4 omitted).

An obvious question becomes whether the trial should have been temporarily adjourned until the need for at least some of the life-support medications abated, or until petitioner underwent cardiac surgery? Can it be gainsaid that none of the medications were capable of producing side effects that impaired clarity of mind? Recall that within petitioner's uncontroverted § 2254 affidavit he was described as "basically, a zombie" (App. 29, *infra*). Was petitioner's health (and for Due Process Clause purposes-competency) so unimportant to the trial court and Illinois prosecutors that a "rush"-to-trial was obligatory?[6]

---

[6] In *United States v. Lopez*, 71 F.3d 954, 958 (1st Cir. 1995), the court considered a similar situation, but noted that the district court did not ignore the issue of the defendant's health ("Far from ignoring the issue, the trial court deferred trial for a substantial period, summoned medical experts one after another, took an active role in securing diagnoses for *Lopez*, had him re-examined repeatedly, and took testimony and made findings in abundance, including a detailed post-trial order summarizing the court's findings and reasons for proceeding with trial"). In *Lopez*, the district court's appointed expert testified that *Lopez* was fit to testify, 71 F.3d at 959.

Juxtaposing *Lopez* to petitioner's case, the sole parallel is the obvious health obstacles each suffered prior to, and during

(continued...)

In *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841 (1964), the Court affirmed a criminal contempt conviction after *Ungar* was granted a five-day continuance to prepare for the contempt hearing. Notwithstanding the limited and clear-cut contempt issue, Justice White explained:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. * * * Contrariwise, *a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.*

376 U.S. at 589 (ital. emph. added).

In sum, the decision below, conflicts with the Court's precedent, *viz.*, exposing an incompetent accused to trial. Additionally, the case below cannot be squared with the § 2254 April 2000 Court opinions as explained, *ante*.

---

[6] (...continued)

trial. However, in *Lopez*, the district court demonstrated realistic concerns for *Lopez* as both a human being and criminal accused. The case at bar is the functional opposite—neither the trial court nor the sovereign was at all concerned with anything other than [a] "rush-to-trial."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891
Attorney for Petitioner

APPENDIX

TABLE OF CONTENTS TO APPENDIX

PAGE

USCA 7 COA DENIAL dated March 17, 2000 ..... App. 1

U.S. District Court Memorandum opinion and judgment dated June 23, 1999 ..... App. 2

U.S. District Court order denying COA dated August 12, 1999 ..... App. 15

Original trial court Motion to expand bond requirements for medical treatment dated June 1, 1994 ..... App. 18

Original trial court Motion for Continuance because of petitioner's medical difficulties dated July 14, 1994 ..... App. 20

Original trial court Motion for Continuance because of petitioner's medical difficulties dated July 21, 1994 ..... App. 24

Petitioner's Affidavit in support of § 2254 relief filed in 97 C 8424 (case below) ... App. 28

App. 1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 7, 2000
Decided March 17, 2000

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 99-3077

RICHARD KAGAN,

Petitioner-Appellant,

v.

THOMAS ROTH, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 8424—Wayne R. Andersen, *Judge*.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

App. 2

[Dated June 23, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. RICHARD KAGAN,	)	
Petitioner,	)	No. 97 C 8424
v.	)	
	)	Honorable
THOMAS ROTH and JAMES E. RYAN, Illinois Attorney General,	)	Wayne R. Andersen
Respondents.	)	

MEMORANDUM OPINION AND ORDER

Following a jury trial in the Circuit Court of Lake County, Richard Kagan ("Kagan") was convicted of solicitation of murder for hire and attempted first-degree murder. He was sentenced to consecutive terms of 30 years imprisonment for solicitation to commit murder and 12 years imprisonment for attempted first-degree murder. The convictions were affirmed by the Illinois Appellate Court and Kagan's petition for leave to appeal to the Illinois Supreme Court was denied. Kagan is currently serving his sentence at Dixon Correctional Center located in Dixon, Illinois. He now petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions. He names as respondents his custodian, Thomas P. Roth, and James E. Ryan, as the Illinois Attorney General. James E. Ryan is dismissed from this action because

"the only proper respondent in a collateral attack is the petitioner's custodian." *Hogan v. Hanks*, 97 F.3d 189, 190 (7th Cir. 1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L. Ed. 2d 546 (1997). For the reasons discussed below, the petition for a writ of habeas corpus is denied.

BACKGROUND

In April 1994, Kagan paid $10,000 to Ronald Petkus, a reputed enforcer for the Hell's Henchmen motorcycle gang, to murder his wife, Margaret Kagan. Kagan and his wife were entrenched in a bitter divorce dispute at the time. Kagan was a criminal defense attorney who had previously represented Petkus. While Margaret was in Chicago meeting with Kagan and his attorney about the divorce, Petkus and Cragin, another Hell's Henchman, planted a bomb under Margaret's car at the Fort Sheridan Metra train station. When Margaret returned and started her car, the bomb exploded, setting the car on fire. Margaret escaped from the burning car with only minor injuries. Kagan was arrested on April 28, 1994.

On May 4, 1994, a Lake County grand jury returned a three-count indictment charging Kagan with solicitation to commit murder, attempted first-degree murder, and conspiracy to commit first-degree murder. On July 21, 1994, the case proceeded to trial and, five days later, the jury found Kagan guilty on each count. The trial court entered judgments on the first two counts, and sentenced Kagan to consecutive terms of imprisonment of 30 years for solicitation of murder for hire and 12 years for attempted first-degree murder. Kagan then

filed a timely notice of appeal to the Illinois Appellate Court arguing that the trial court abused its discretion when it denied his motion for a continuance because of his physical condition, and that the trial court erred in sentencing Kagan to consecutive sentences. The Illinois Appellate Court affirmed the convictions finding that the trial court did not abuse its discretion in denying Kagan's motion for a continuance. *People v. Kagan*, 283 Ill.App.3d 212, 219, 669 N.E.2d 1239, 1244, 218 Ill.Dec. 713, 718 (1996). The Court found that the trial court erred in imposing consecutive sentences of imprisonment and accordingly modified the sentences to run concurrently. *Id.* at 1247.

Kagan then filed a petition for leave to appeal to the Illinois Supreme Court. In his petition, Kagan argued that he was entitled to a hearing pursuant to 725 ILCS 5/114-4 to determine whether he was physically competent to stand trial and that he was denied his Fifth and Sixth Amendment rights when he was required to demonstrate prejudice resulting from his inability to participate in his defense because of his physical condition. The Illinois Supreme Court denied leave to appeal. *People v. Kagan*, 169 Ill.2d 579, 675 N.E.2d 637, 221 Ill.Dec. 442 (1996). On December 4, 1997, Kagan filed a habeas petition in this case and, on November 24, 1998, a supplemental petition. He argues that the denial of his motion for a continuance violated his right to a fair trial and his right to effective assistance of counsel because his physical and emotional problems prevented him from cooperating with his defense lawyer. He also claims that his trial lawyer was ineffective for failing to follow the proper statutory procedure in her failed attempts to get a continuance and for failing

to employ an expert witness to examine the post-bombing condition of the car.

DISCUSSION

Federal courts may issue a writ of habeas corpus if a petitioner demonstrates that he is "in [state] custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Moffat v. Gilmore*, 113 F.3d 698, 702 (7th Cir. 1997); see *also Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1370 (7th Cir. 1994) (en banc) ("[F]ederal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law.") (citation and internal quotations omitted), *cert. denied*, 514 U.S. 1037, 115 S.Ct. 1404, 131 L. Ed. 2d 290 (1995). The federal courts may not grant habeas relief under Section 2254 unless the state court's judgment "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Before a federal court may review the merits of a habeas petition, a petitioner must: "(1) exhaust all remedies available in state courts; and (2) fairly present any federal claims in state court first, or risk procedural default." *Bocian v. Godinez*, 101 F.3d 465, 468 (7th Cir. 1996) (citations omitted); *see also Henderson v. Thieret*, 859 F.2d 492, 496 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009, 109 S.Ct. 1648, 104 L. Ed. 2d 163 (1989). "The habeas petitioner must present his

federal constitutional claims initially to the state courts in order to give the state the 'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *McGowan v. Miller*, 109 F.3d 1168, 1172 (7th Cir. 1997) (quoting *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L. Ed.2d 865 (1995) (citation omitted)). In this case, exhaustion is not at issue. Respondent concedes that Kagan has exhausted his state court remedies for purposes of federal habeas review because he has no further avenues in state court through which to challenge his convictions. We now turn to the issue of procedural default.

The procedural default hurdle forbids the federal courts from addressing claims that were not fairly presented to the state courts. *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir.), *cert. denied*, 512 U.S. 1241, 114 S.Ct. 2753, 129 L. Ed. 2d 870 (1994). Procedural default occurs either when a state court has declined to address a federal claim because the petitioner failed to satisfy an independent and adequate state procedural requirement, *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554, 115 L. Ed. 2d 640 (1991), or when the petitioner fails to present a claim to the state courts at the time, and in the way, required by the state. *Hogan v. McBride*, 74 F.3d 144, 146 (7th Cir. 1996). In determining whether a petitioner has forfeited or procedurally defaulted any of his claims, we look solely to state law. As the Seventh Circuit has explained, "[f]orfeiture depends on state law, and it is accordingly essential to know whether the state courts either have held that a procedural misstep is a forfeiture, or would so hold if a collateral attack were filed in state court." *Id.* at 147.

We find that Kagan has preserved his first claim for federal habeas review. On direct appeal Kagan argued that the trial court denied him a fair trial when it refused to continue the trial even though the court was informed that Kagan's physical condition prevented him from preparing his defense. While Kagan did not cite "book and verse on the federal constitution," he asserted his "claim in terms so particular as to call to mind a specific constitutional right protected by the Constitution." *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450, 454 (7th Cir. 1984) (internal quotations omitted). Indeed, Kagan cited throughout his appellate brief the effect the trial court's decision had on his ability to prepare his defense and the fairness of proceeding under such circumstances. Kagan also raised the substance of this claim in his petition for leave to appeal to the Illinois Supreme Court by asserting that his physical condition precluded him from assisting counsel in the preparation of his defense. *O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S.Ct. 1728 (1999) (holding that the failure to raise a claim in a petition for discretionary review before the Illinois Supreme Court results in a procedural default). This is sufficient to preserve this claim. Kagan did not procedurally default this claim by failing to raise it in a petition for post-conviction relief because the doctrine of res judicata would have barred review of this claim. *Cawley v. DeTella*, 71 F.3d 691, 694 (7th Cir. 1995).

The Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 1379, 134 L. Ed. 2d 498 (1996) (internal quotations omitted). The minimum

standard of competency under federal due process is "whether [a person] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *United States ex rel. Mireles v. Greer*, 736 F.2d 1160, 1165 (7th Cir. 1984). Under Illinois law, "[w]hen a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further." 725 ILCS 5/104-11(a). The state procedures, if followed, are "constitutionally adequate." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L. Ed. 2d 103 (1975). Therefore, we must decide whether, at the time of trial, it was reasonable for the trial court to decide that there was no bona fide doubt as to the competency of Kagan to stand trial.

The events relevant to this determination began on May 13, 1994 when Kagan filed a motion to reduce bond. He stated that before his arrest he had scheduled heart surgery to remedy a cardiovascular condition and that, without immediate surgery, he could die. He claimed that his medical condition prevented him from participating in the preparation of his defense. He claimed that when he met with his lawyer to prepare for trial he had to abruptly end the meeting because the stress of the discussions brought on a seizure. Nonetheless, Kagan rejected the State's offer to agree to a medical furlough. Kagan then testified in support of his motion to reduce bond that he suffered a ruptured aneurysm in his carotid artery in 1988 and was also diagnosed with angina pectoris. He testified that a special surgery at a medical center in Phoenix, Ari-

zona was necessary to remove blockage that was found in two of his arteries. The trial court denied Kagan's motion but indicated its willingness to entertain a medical furlough based on either evidence that immediate surgery was necessary or an agreement between the parties.

On June 1, 1994, Kagan filed a motion for a continuance and a motion to expand bond to allow him to travel to Arizona because his deteriorating condition allegedly required him to undergo a special cardiovascular surgery. He argued that the trial should be continued because without surgery he would be unable to assist in the preparation of his defense. The motion to expand bond was heard on June 16. Kagan testified about the medical procedure and indicated that, although Washington, D.C. and Chicago had facilities able to perform the procedure, the medical center in Arizona had the most experience performing the procedure. He testified that his treating physician told him not to participate in courtroom activities. He also stated that he was unable to assist in his defense because he suffered from significant chest pain, fatigue, and dizziness, which caused him to collapse during one conference with his lawyer. The trial court denied the motion finding that Kagan was a flight risk and that there was not a medical emergency because Kagan worked approximately 12 hours a week at his law firm and regularly appeared at his divorce proceedings.

The trial court heard the motion for a continuance on July 6. Defense counsel indicated that she was not prepared to address the motion. In response to the trial court's inquiry if she wished to add to the motion, counsel stated that Kagan was no longer a good candi-

date for the procedure in Arizona and that bypass surgery was now needed because of Kagan's kidney condition. The trial court denied the motion stating that "[t]here is no testimony from anyone that [the] degree of blockage is something that requires immediate surgery. As a matter of fact, I have been seeing [Kagan] regularly in court; I don't know that there is any emergency . . . ." This motion was followed with another motion for a continuance on July 14 requesting the court to hold a mental competency hearing under 725 ILCS 5/114-4. Defense counsel argued that the trial court should hold a hearing to determine Kagan's mental competency to stand trial because the stress of a trial exacerbated his mental condition so much that he was unable to cooperate with counsel. Also, Kagan's internist opined that the rigors of a trial would continue to aggravate Kagan's symptoms.

The trial court denied the motion finding that there was no evidence that Kagan was unable to cooperate with counsel due to an emotional defect or that he was unable to understand the proceedings. The court noted that Kagan had appeared in court on a number of occasions and appeared alert, in touch with reality, and competent when he addressed the court. The court found no evidence to raise any questions as to Kagan's mental or emotional ability to cooperate with counsel. The court also concluded that there was no evidence presented that Kagan's physical condition rendered him incompetent to stand trial. On the day trial was set to begin, Kagan filed one last motion for a continuance arguing that his physical condition precluded him from assisting in his defense. This issue, however, was not argued at the hearing on the motion. Meanwhile,

Kagan never had his doctors contact the State's Attorney so that arrangements could be made for a medical furlough, as suggested by the State at the initial hearing on Kagan's motion to reduce bond.

Based on these facts, the Illinois Appellate Court found that there was "no evidence that raised a bona fide doubt that defendant was incapable of cooperating with his counsel." *People v. Kagan*, 669 N.E.2d at 717. The Court noted that the trial court observed Kagan in court with counsel, pro se, and during his testimony and found him to be capable of understanding the proceedings and assisting his counsel. *Id.* The trial court's determination that Kagan was fit to stand trial is a finding of fact. *Maggio v. Fulford*, 462 U.S. 111, 117, 103 S.Ct. 2261, 2264, 76 L. Ed. 2d 794 (1983) (per curiam). We must presume that this finding is correct, and the burden is on Kagan to rebut this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Acknowledging his burden, Kagan has submitted transcripts of the state proceedings which, in his view, establishes that the trial court created "a prosecutorial advantage by continually denying petitioner an opportunity to get the essential medical treatment which would have allowed petitioner to fully participate in pretrial investigation and preparation." (Pet'r Mem. at 4).

After a careful review of the record, we find that Kagan has failed to rebut by clear and convincing evidence the presumption that the trial court correctly determined that he was fit to stand trial. The trial court, rather than impeding Kagan's ability to obtain medical treatment, early on attempted to accommodate Kagan through a medical furlough but Kagan insisted

on a reduction in bond. The court also provided Kagan an opportunity to present evidence as to the seriousness of his medical condition and how it was affecting his ability to prepare for trial. Dr. Adelson testified about Kagan's medical condition and opined that the stress and rigors of a trial would exacerbate the chest pains Kagan was experiencing. On cross-examination, Dr. Adelson acknowledged that Kagan was capable of reading and comprehending and that "what we're really talking about here is stress." Ex. 2 at p.13. The trial court found this testimony insufficient to raise a question as to Kagan's ability "to cooperate with counsel because of any emotional defects or any inability to understand the nature of these proceedings." *Id.* at 17. Kagan has given us no reason to conclude otherwise.

In short, Kagan has not shown that the Illinois Appellate Court's adjudication of this claim involved either an unreasonable application of clearly established Federal law as determined by the Supreme Court or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). The trial court had an opportunity to observe Kagan's conduct in the courtroom and, based on the evidence before it (including the testimony of Kagan and Dr. Adelson), concluded that there was not a bona fide question as to Kagan's ability to stand trial. A court on federal habeas review "may not substitute its own judgment concerning the credibility of witnesses in a state proceeding to determine a defendant's competence to stand trial." *United States ex rel. Bilyew v. Franzen*, 842 F.2d 189, 192 (7th Cir. 1988). Kagan's self-serving, unsigned affidavit is insufficient to call into doubt the trial court's finding. For

these reasons, this claim is not a proper basis for habeas relief.

Kagan also claims that his trial lawyer was ineffective because she failed to employ an expert to analyze his wife's car after the bombing. Kagan failed to raise this claim in the state courts, but claims that he first learned that the physical condition of the car conflicted with the testimony of a State witness only after his direct appeal was denied and after the expiration of the time for him to file a post-conviction petition. To prevail on this claim, Kagan must demonstrate that his trial lawyer's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.-Ed. 2d 674 (1984). Nowhere does Kagan explain the nature of the evidence relating to the post-bombing condition of the car. Absent this information, we cannot determine whether his trial lawyer was constitutionally ineffective by failing to hire an expert to examine the car or whether there is a reasonable probability that this evidence would have changed the outcome. This claim is therefore without merit.

Finally, Kagan argues that his trial lawyer was ineffective because she "failed to follow the Illinois statutory mandates in her failed efforts to secure a trial adjournment." (Supp. Pet. at p.6). Kagan failed to assert this claim on direct appeal. He claims that his appellate lawyer was ineffective for failing to raise this issue and that this serves as "cause" to excuse his procedural default. Although ineffectiveness of appellate counsel can constitute "cause" for purposes of procedur-

al default, Kagan has not satisfied the prejudice prong of the cause and prejudice test. He fails to identify specifically what his trial lawyer failed to do in moving for a continuance. Based on his affidavit, Kagan apparently believes that his trial lawyer was ineffective for failing to submit the affidavits of several physicians who testified about Kagan's medical condition and the need for a continuance. Because Kagan does not explain the nature of this testimony or how it differed from Dr. Adelson's testimony, we cannot conclude that his trial lawyer's alleged errors prejudiced Kagan. Therefore, this claim is procedurally defaulted and is without merit.

CONCLUSION

For all of the foregoing reasons, Richard Kagan's petition for a writ of habeas corpus is denied. We also deny Kagan's request for an evidentiary hearing because he has failed to show how an evidentiary hearing would be helpful in assessing the evidence he has produced in support of his petition. *See* 28 U.S.C. § 2254, Rules Governing § 2254 Cases, Rule 8(a).

It is so ordered.

/s/ Wayne R. Andersen
United States District Judge

Dated: June 23, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 97 C 8424 Date: August 12, 1999

Name of Assigned Judge: Wayne R. Andersen

Case Title: Richard Kagan v. Thomas Roth

* * * * *

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]

(11) X [For further detail see order (on reverse side of/attached to) the original minute order.]

* * * * *

[Reverse Side]

(Reserved for use by the Court)

ORDER

This matter is before the court on the motion of petitioner, Richard Kagan, for a certificate of appealability. For the reasons discussed below, the motion is denied.

Under 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." This standard differs only in scope from the certificate of probable cause standard that was previously developed and applied by the courts. *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996). "The two certificates differ only in scope: a certificate of

probable cause places the *case* before the court of appeals, but a certificate of appealability must identify each *issue* meeting the 'substantial showing' standard . . . ." *Id.* Therefore, in order for the district court to grant a certificate of appealability it must identify the issues that "are debatable among jurists of reason" or that are "adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S. Ct. 3383, 3395 n. 4, 77 L. Ed. 2d 1090 (1983) (internal quotations omitted).

Kagan requests a certificate of appealability on the following two questions: "(a) Whether the entire record tends to establish that the petitioner's serious cardiac-health-related maladies rendered him incompetent to stand trial under the 5th and 6th amendments (due process and ability to assist counsel in his defense), contrary to or unreasonably applying settled United States Supreme Court precedent? and (b) Whether there is a constitutionally recognized *per se* conflict of interest under circumstances where defense counsel advises the trial court, prior to trial, that the defendant cannot assist in preparing his, defense, but nonetheless goes forward in a serious felony trial?" (Mem. at p. 2).

On June 23, 1999, this court denied Kagan's petition finding that his claims were without merit. *We* found that Kagan had failed to rebut by clear and convincing evidence the presumption that the trial court correctly determined that he was fit to stand trial. We found that the trial court had an opportunity to observe Kagan's conduct in the courtroom and, based on the evidence before it (including the testimony of Kagan and Dr. Adelson), concluded that there was not a bona fide question as to Kagan's ability to stand trial. We

decline to issue a certificate of appealability on Claim (a) because it is based entirely on the trial court's conclusion that Kagan was fit to stand trial, a finding that is not called into question by clear and convincing evidence in the trial record. We also deny Kagan's request for a certificate of appealability on Claim (b) because it too rests on this factual finding and, in any event, was never presented to the state courts.

For all of the foregoing reasons, we deny petitioner's request for a certificate of appealability. The Clerk of the District Court for the Northern District of Illinois is directed to submit a copy of this order to the Clerk of the United States Court of Appeals for the Seventh Circuit.

It is so ordered.

/s/ Wayne R. Andersen
United States District Judge

Dated August 12, 1999

[Filed June 1, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)	
)	No. 94 CF 795
vs.)	
)	Judge Scott
RICHARD KAGAN)	

MOTION TO EXPAND THE BOND REQUIREMENTS TO ALLOW DEFENDANT TO TRAVEL TO ARIZONA FOR THE PURPOSE OF RECEIVING CARDIOVASCULAR SURGERY

Now comes the Defendant, RICHARD KAGAN, by his, attorney, ANITA RIVKIN-CAROTHERS, and asks this Honorable Court for an Order expanding the conditions of bail bond to allow Defendant to travel to Arizona for the purpose of receiving cardiovascular surgery. In support whereof, Defendant states:

1. Mr. Kagan is presently released on a One Million Dollar Bond.

2. Mr. Kagan suffers a cardiovascular condition which requires immediate surgery. He was, and had been, scheduled for surgery for the day following his arrest in this cause.

3. Because of his deteriorating condition, without surgery, Mr. Kagan has been and will be unable to assist in the preparation of his defense.

4. Mr. Kagan is requesting that the conditions of his bond be expanded to allow him to travel to the Arizona Heart Institute, in Phoenix, Arizona. Dr. Strumpf, car-

diologist at the Arizona Heart Institute, has agreed to schedule surgery for Mr. Kagan on June 20, 1994. The hospitalization requirements would be approximately 10 days, absent any unforeseen complications. Mr. Kagan is therefore asking permission to leave Chicago to travel to Phoenix, Arizona on June 17, 1994. He would expect to return to Chicago July 1 or 2, 1994.

5. While the procedure that has been recommended for Mr. Kagan is now being performed in the Chicago area, at the Northwestern Memorial Hospital, the Northwestern team has only been doing the procedure for a few weeks. Until a few weeks ago, the procedure recommended for Mr. Kagan was only performed at George Washington Hospital and at the Arizona Heart Institute, in Phoenix. The recommendation from his treating physician at Evanston Hospital, is that Mr. Kagan should have the procedure done at the Arizona Heart Institute, because of its vast amount of experience, and the routinization of the procedure at that facility.

WHEREFORE, Defendant asks that he be granted an order allowing him to travel to Phoenix, Arizona on June 17, 1994, and to return to Chicago on July 2, 1994.

/s/ Anita Rivkin-Carothers
Attorney for Defendant

Anita Rivkin-Carothers
33 North LaSalle Street
Suite 3300
Chicago, Illinois 60602
(312) 641-2901

App. 20

[Filed July 14, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	No. 94 CF 795
vs.	)	
	)	Judge Scott
RICHARD KAGAN	)	

MOTION FOR CONTINUANCE

Defendant, RICHARD KAGAN, by one of his attorneys, ANITA RIVKIN-CAROTHERS, pursuant to Chapter 38, Section 114-4, moves this Honorable Court for an order continuing the trial in the captioned cause. In support thereof Defendant states as follows:

1. Mr. Kagan was arrested on April 28, 1994 and charged in the captioned indictment with solicitation to commit murder.

2. The State has tendered to date, 734 pages of discovery, plus 3 tape cassettes. They have listed approximately 60 witnesses that they may call.

3. Mr. Kagan has been under the constant care of physicians in connection with a coronary condition since before the arrest in this case.

4. Mr. Kagan, because of the coronary condition, has been unable to assist his attorney in the preparation of his defense, because of chest pains and the need for nitroglycerin tablets.

5. Counsel for defendant does not purport to be a medical expert, but it is apparent that the stress of

dealing with the details necessary to prepare a defense, are more than Mr. Kagan can handle at this time.

6. Because of Mr. Kagan's inability to assist in the preparation for trial, counsel has just learned of a material witness, whose testimony counsel believes to be critical to set and perfect the impeachment of the State's main witness, Ronald Petkus, as to motive, bias and credibility. Counsel first learned of the existence of this potential witness from Mr. Kagan on or about July 5. Counsel has engaged an assistant to track down the witness, using the last known address and telephone numbers. To date, we have not been able to speak with the witness, but we are still pursuing avenues that we believed will be successful, if we can have some additional time.

7. In addition to the question of Mr. Kagan's physical competence to stand trial at this time, Counsel for defendant believes that she has a duty to her client and a responsibility to the Court to seek a determination as to whether Mr. Kagan is mentally competent, pursuant to legal standards, to stand trial at this time. While Counsel does not suggest that Mr. Kagan is insane, there is a legal question of whether a person is mentally competent to stand trial, when he is not able to assist in the preparation of his own defense. Mr. Kagan has exhibited what counsel believes to be characteristics that he is mentally unable to deal with the issues and questions of fact, so as to assist counsel in the preparation of a defense.

8. The charges in this case are serious, carrying with them potential sentences of up to 85 years. With stakes this high, the defendant has a due process right to pre-

sent the most effective and aggressive defense possible. We cannot present an aggressive and effective defense when defendant is not competent to assist counsel in the preparation of that defense.

9. Mr. Kagan's treating physician has stated that the rigors of trial may create pain and discomfort for Mr. Kagan. The doctor has indicated that he believes with treatment of medication Mr. Kagan would be in a better physical condition to endure the rigors of a trial within a reasonable period of time.

10. The defendant is seeking a reasonable period of time to attempt to locate a material witness, whose testimony is essential to the defense.

11. The continuance of this trial will in no way prejudice the prosecution, as the case has been indicted for less that 90 days.

12. While the defendant recognizes that the court has set aside a certain time for this trial, the defendant would be willing to wait until this court is available to hear this matter.

WHEREFORE, for all of these reasons, the defendant respectfully asks that this motion be granted.

/s/ Anita Rivkin-Carothers
Attorney for Defendant

Anita Rivkin-Carothers
33 North LaSalle Street
Suite 3300
Chicago, Illinois 60602
(312) 641-2901

STATE OF ILLINOIS)
)
COUNTY OF COOK)

I, Anita Rivkin-Carothers, being duly sworn on oath state that I have read the foregoing motion for continuance, and that the same is true to the best of my knowledge and belief.

/s/ Anita Rivkin-Carothers
Anita Rivkin-Carothers

Subscribed and Sworn to before me
this 14th day of July, 1994.

/s/ Charles J. Scott
Judge

App. 24

[Filed July 21, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)	
)	No. 94 CF 795
vs.)	
)	Judge Scott
RICHARD KAGAN)	

MOTION FOR CONTINUANCE

Defendant, RICHARD KAGAN, by his attorney, ANITA-RIVKIN CAROTHERS, moves this Honorable Court for continuance. In support thereof Defendant states as follows:

1. On July 14, 1994, Defendant filed a motion to produce, seeking the government to produce the reports of Agent Chavarria regarding a "confidential source" who stated that defendant, Richard Kagan was the target of the bombing. The court agreed that this was *Brady* material and ordered-that the State produce such reports by Friday, July 15, 1994. The materials were not produced on Friday, and as of 10:30 p.m., July 17, 1994, the reports had not been produced.

2. On the day of trial, July 18, 1994, the materials requested were produced by the State. Those materials contain information that is, in fact, exculpatory to the defendant. However, the materials require that defense counsel locate and interview certain witnesses, that are material witnesses to the exculpatory statements. Counsel has located one witness, but has not had the opportunity to speak with him regarding his testimony.

There is another witness that counsel has attempted to locate, but without success at this time. Co-counsel, is out today, attempting to interview and serve a subpoena on this witness.

3. Because the defense has just learned of this information two days ago, we are entitled to time to investigate, particularly where this delay was not caused by the defense, and is not an effort by the defense to unduly delay this trial.

4. In this case, Mr. Kagan is facing a potential sentence of 77 years in prison. He has a right to be given sufficient time to prepare to defend against these charges and present his defense in a coherent manner.

5. Defendant seeks a continuance to August 29, 1994 to try this case.

6. Additionally, defendant seeks a continuance based on pretrial publicity that has caused prejudice against the defendant on the part of the community. Pretrial publicity was in the form of an article appearing in Friday's Chicago Tribune, attached hereto as Exhibit A. The article suggests that the defendant is improperly seeking to delay his trial.

5. Along the lines of publicity on Sunday and Monday night, NBC aired its Movie of the Week, parts one and two of Deadly Matrimony, a movie concerning the real life story of the alleged contract murder of Diane Masters, by her attorney husband, Alan Masters. The untimely showing of this film prejudices the defendant on the part of the community, in that potential jurors will have a difficult time distinguishing that case from the case on trial.

7. Counsel for defendant seeks a continuance, again, based on the physical condition of her client which condition has precluded him from taking part in the preparation of his defense, because of the stress related to going through the 784 pages of discovery the State has provided to date in this case. Mr. Kagan is unable to review these materials with counsel in the manner required to prepare for trial without extreme chest pains, and the need to take medication. Mr. Kagan's treating physician has him on a medical regiment designed to increase his ability to handle stress, including the stress of trial and trial preparation.

8. This is not a case that has been on the dockets of this courthouse for an excessive or extensive period of time. Mr. Kagan was arrested less than 90 days ago, on April 28, 1994. He was arraigned on May 4, 1994. His request for a continuance is not designed to drag this case for the purpose of interfering with the administration of justice or the efficiency of this court, nor is this request designed to cause prejudice to the Prosecution in any way. The only purpose in seeking a continuance is to give Mr. Kagan the time to be able to prepare and assist in the preparation of his defense, and to give counsel the time needed to locate, interview and prepare the case based on the exculpatory evidence tendered on the day of trial, pursuant to defense motion and this Court's order.

WHEREFORE, for all of the foregoing reasons, defendant prays that his case be continued to August 29, 1994 for trial.

Respectfully submitted,

/s/ Anita Rivkin-Carothers
Attorney for Defendant

Anita Rivkin-Carothers
33 North LaSalle Street
Suite 3300
Chicago, Illinois 60602
(312) 641-2901

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD KAGAN,	)	
	)	
Petitioner,	)	No. 97 CIV 8424
vs.	)	
	)	Honorable
THOMAS ROTH, Warden,	)	Wayne R. Andersen
	)	Presiding Judge
Respondent.	)	

AFFIDAVIT

Richard Kagan, being first duly sworn on oath, deposes and states as follows:

1. Your affiant was the defendant in the Lake County criminal proceedings entitled *People of the State of Illinois v. Richard Kagan*, 94 CF 795. Your affiant was represented in those proceedings by Attorney Anita Rivkin-Carothers.

2. During April 1994, I was a patient in Evanston Hospital, Evanston, Illinois, and it was medically determined that I was a suitable candidate for coronary surgery which was scheduled at the Arizona Heart Institute. My surgery was scheduled for either late April or early May 1994.

3. In May-July 1994, I was being medicated with prescribed medications which included Meclazine, a medication for the treatment of the symptoms of vertigo, dizziness, and a diuretic, also used in combination for the treatment of high blood pressure. I was still taking anti-convulsive medication and also Nitro-

stat, nitroglycerin tablets, for the control of pain related to irregular heart beat.

However, my arrest in 94 CF 795 intervened and notwithstanding several requests for judicial permission to travel for that heart surgery, I was consistently denied an opportunity to have needed coronary surgery performed prior to my July 1994 Lake County, Illinois, felony jury trial. As a result of being deprived of the oppcrtunity to have that surgery, I was only able to function by ingesting the proscribed coronary medication which included taking Procardia L-30, Lopressor, Antivert, and Nitro-Stat (as needed for pain relating to my irregular heart beat and cardiac condition) three times a day.

As a result of ingesting the prescribed medications I was, basically, a zombie. Certainly I was able to walk and talk, but I certainly was not able to in any reasonable manner facilitate or cooperate with Anita in the preparation of my felony-defense. It isn't as if she didn't make an effort—she did. However, between taking the medication needed simply to breathe, walk and talk and the escalated stress and trauma involving my ongoing divorce litigation and the criminal case, there was simply no way for me to effectively assist counsel in my criminal-case defense.

I pleaded with Ms. Carothers, throughout June and early July, 1994 to prepare and file motions, supported by the affidavits of available physicians, including Dr. Bernard Adelson, Evanston Hospital, and Dr. Howard Cohen, Cardiologist, 55 E. Washington, Chicago, Illinois, Cardiac Consultants of Chicago. Each was prepared to submit detailed affidavits regarding my need

for coronary surgery, my deteriorating physical and mental conditions as a result of taking all the medications and how there was simply no reasonable way for me to be considered competent to stand trial at that time (July 1994). Ms. Carothers filed one or two inarticulate motions, none supported by medical affidavits, requesting a continuance of the trial date. The lack of articulation regarding the absolute need for a trial adjournment contributed to trial adjournment-denial. When Ms. Carothers brought my failing mental condition to the attention of the trial judge, immediately prior to trial, she requested a B.C.Ex. (an unrecognized Cook County pseudonym where counsel seeks either a psychiatric or psychological client-examination where competency is questioned). Based on the garbled manner in which my defense attorney's request was made, the trial court basically "pooh-poohed" it—although I had been ready, willing and able to be psychologically or psychiatrically examined from late May to July, 1994. In other words, my defense attorney well-knew I lacked the capacity to cooperate in my defense based on a combination of physical and emotional difficulties, but she utterly failed to follow the prescribed method of requesting trial adjournment until a point in time where the ability to cooperate would have allowed me to play a meaningful role during the preparation and investigation stage of my case.

3. I have no clear recollection of my jury trial. Much of the time I was in a medically induced fog. I recall being carted off to the Lake County Jail after my trial. While in the Lake County Jail I was given heart medication although I do not recall what prescribed medications were made available at that jail.

4. Eventually, my family and friends agreed that I should hire an appellate lawyer. I hired Sherman Magidson and he wrote my direct appeal to the Illinois Appellate Court, Second District. In that appeal, he raised a mixed continuance/competency issue and an issue relating to the imposition of consecutive sentences. The Illinois Appellate Court affirmed my conviction but ordered the vacation of the consecutive sentence (originally I had been sentenced to a total of 42-years; the appellate court modified the sentence to 30-years). My appellate attorney petitioned the Illinois Supreme Court for review, but they declined.

5. Following the denial of review in the Illinois Supreme Court I wrote to my appellate attorney, time and again, asking that he commence Illinois post-conviction proceedings. He never did so. What he did do, was on the last day for filing a federal habeas corpus, he caused to be filed a simple petition, with no supporting memorandum or exhibits. I tried to contact him many times from approximately February 1998 to roughly August 1998 regarding the status of any of my post-conviction proceedings. He answered once in all that time. Please note that I had specifically asked him to proceed with an Illinois post-conviction petition, which he never did.

6. As a result of my original appellate lawyer's failure to file an Illinois post-conviction petition, I am now out-of-time for any such filing. I have read the response of the State of Illinois in 97 CIV 8424 (this case) and they seem to indicate that there are procedural defaults or some such thing in connection with my pending petition. I know nothing of procedural defaults, all I know is that my appellate attorney, Mr.

Magidson, had promised me that he would file my Illinois post-conviction petition and he failed to do so. After all is said and done, my family hired my present attorney who has prepared additional federal filings in an effort to make sure that I get a fundamentally fair opportunity to present my constitutional claims for conviction vacation.

Wherefore, your affiant respectfully moves that this Court grant relief pursuant to 28 U.S.C. § 2254.

Respectfully submitted,

_____

**Richard Kagan

SUBSCRIBED and SWORN
to before me this ___ day
of December, 1998.

_____

Notary Public

** This affidavit in support of petitioner's foregoing petition pursuant to 28 U.S.C. § 2254 is being filed with the Clerk of the United States District Court prior to petitioner's re-execution of this supplemental § 2254 petition. However, the accuracy of its content has heretofore been verified in telephonic conversations with the petitioner, and upon execution and return to counsel an original executed Affidavit will be substituted for this filing.